

Dear Colleagues,

Thank you for the opportunity to present at Berkeley's law and economics workshop. As you will see, I've written this paper with an eye towards publication in a law review. Law reviews often want lots of background, and I've obliged, leading to a long draft. Here's some guidance for readers short on time: if you're familiar with the basic debate over entrenchment, start on page 15, and if you're familiar with that and spatial modeling, start on page 22.

This is a work-in-progress, and I look forward to your feedback.

Sincerely,

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Entrenchment: The Problem of Constitutionalism

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INTRODUCTION

Does one generation have a right to bind another? Thomas Jefferson thought this “a question of such consequences as not only to merit decision” but place “among the fundamental principles of every government.”¹ He thought the answer no, arguing that “[e]very constitution . . . , and every law, naturally expires at the end of 19 years.”² James Madison believed otherwise, arguing that Jefferson’s position would make law “too mutable” and undercut the respect that “antiquity inspires.”³ He argued that constant revision of law would cause instability,⁴ invite faction,⁵ and spark violence over property rights.⁶ Each generation, Madison concluded, gives “tacit assent . . . to established Constitutions and laws.”⁷

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¹ Letter from Thomas Jefferson to James Madison, Sept. 6, 1789 in 7 *The Writings of Thomas Jefferson* 454 (A. Bergh ed. 1907).

² *Id.* Later in life Jefferson’s view seemed to soften. See Letter from Thomas Jefferson to Samuel Kercheval, July 12, 1816 in 15 *The Writings of Thomas Jefferson* 32, 40-41 (A. Bergh ed. 1907) (“I am certainly not an advocate for frequent and untried changes in law and constitutions.”).

³ Letter from James Madison to Thomas Jefferson, Feb. 4, 1790, in 16 *The Papers of Thomas Jefferson* 147, 148 (Julian Boyd ed., 1950).

⁴ See *id.* (“Would not . . . a Government depending for its existence beyond a fixed date, on some positive and authentic intervention of the Society itself, be too subject to the casualty and consequences of an actual interregnum?”).

⁵ See *id.* (“Would not such a periodical revision engender pernicious factions that might not otherwise come into existence?”).

⁶ See *id.* (“[M]ost of the rights of property would become absolutely defunct; and the most violent struggles be generated between those interested in reviving and those interested in new-modelling the former State of property.”).

⁷ *Id.*

These titans of constitutionalism framed a debate that still rages. Jefferson anchored the position that law does and should respond to society and its evolving views. Traces of this idea appear in prominent, contemporary works—on popular constitutionalism,⁸ judicial updating,⁹ the strictness of Article V,¹⁰ and amendment outside of Article V,¹¹ including through popular referendum.¹² Madison anchored the view that law does and should remain more-or-less fixed. This idea animates originalism,¹³ support for demanding amendment processes,¹⁴ the primacy of reliance interests,¹⁵ and the view that, as Justice Scalia put it, the Constitution is “dead, dead, dead.”¹⁶

Both sides in this debate, and the many variants of their arguments, circle around the fundamental problem of constitutionalism: how changeable a people’s constitution

⁸ See Larry D. Kramer, *The People Themselves* (2005) (developing popular constitutionalism).

⁹ See, e.g., David A. Strauss, *The Living Constitution* 1–5, 115–139 (2010) (promoting constitutional updating through common law-like adjudication).

¹⁰ See, e.g., Sanford Levinson, *Our Undemocratic Constitution* 167, 172–75 (2006) (decrying the “functional impossibility of amending the Constitution with regard to anything truly significant” and calling for a convention).

¹¹ See generally Bruce Ackerman, *We The People: Foundations* (1993) (developing the notion of “constitutional moments”).

¹² See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *Colum. L. Rev.* 457, 457 (1994) (“We the People of the United States have a legal right to alter our Government—to change our Constitution—via a majoritarian and populist mechanism akin to a national referendum, even though that mechanism is not explicitly specified in Article V.”).

¹³ For overviews of this theory of interpretation, see, for example, Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 *Ohio St. L.J.* 1085 (1989); John Harrison, *Forms of Originalism and the Study of History*, 26 *Harv. J.L. & Pub. Pol’y* 83 (2003); Keith E. Whittington, *The New Originalism*, 2 *Geo. J.L. & Pub. Pol’y* 599 (2004) [hereinafter Whittington, *New*]; Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *Fordham L. Rev.* 375 (2013).

¹⁴ See, e.g., John O. McGinnis & Michael D. Rappaport, *Originalism and the Good Constitution* 33–80 (2013) [hereinafter McGinnis & Rappaport, *Good*] (arguing that supermajority rules like those in Article V generate constitutions with good consequences).

¹⁵ See, e.g., Richard A. Epstein, *Beware of Legal Transitions: A Presumptive Vote for the Reliance Interest*, 13 *J. Contemp. Legal Issues* 70 (2003) (“[B]eware of legal transitions. Wherever possible try to keep the legal framework constant[.]”).

¹⁶ Tasha Tsiaperas, *Constitution a ‘Dead, Dead, Dead’ Document, Scalia Tells SMU Audience*, *Dallas Morning News*, Jan 28, 2013.

should be.¹⁷ This is the question of entrenchment, meaning the insulation of law from change through supermajority rules and other mechanisms. The more supportive scholars and judges are of ready change, the more they oppose entrenchment, and the greater sympathy they tend to have for Jefferson’s position, and vice versa.

Framed in this way, one might suppose that constitutional scholars have devoted many pages to amendment processes. After all, such processes address the problem of entrenchment directly. Making a constitution hard to amend empowers the enacting generation, while making it easy to amend empowers today’s. In fact, scholars have written about this, and much of the work is important and informative, but it is mostly normative in character. Scholars “seek to place one or the other value—legal stability or democracy—in the foremost position.”¹⁸ For example, in asserting that Article V is “just too difficult a process,”¹⁹ Professor Strauss takes the normative position that law should be more responsive than Article V allows. In claiming that demanding amendment processes produce good constitutions, Professors McGinnis and Rappaport take the view that certain values, like consensus, outweigh responsiveness.²⁰

At bottom, the problem *is* normative. Constitutional designers must choose how deeply to entrench their handiwork, and that choice requires difficult and subjective determinations. But to say the problem is normative does not imply that anything goes, that all final choices are equally good or bad.

¹⁷ John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 *Law & Soc. Inq’y* 501, 502 (1997) (raising this question).

¹⁸ *Id.* at 503.

¹⁹ Strauss, *supra* note ____, at 115.

²⁰ See McGinnis & Rappaport, *Good*, *supra* note ____, at 12 (arguing that supermajority rules “compensate for majority rule’s defects” by, among other things, “address[ing] the need for consensus” on entrenched law).

The philosopher John Locke preferred a constitution that could never change.²¹ Most contemporary scholars reject that view. The optimal level of entrenchment depends on background conditions. The ideal amendment process in one society may differ radically from the ideal process in another.²² If we could identify the relevant background conditions, and pair them with different levels of entrenchment, we might make progress. Entrenchment choices that we used to dispute—one’s judgment against another’s—may suddenly command universal support.

Two relevant background conditions emerge from the legal literature. First, as the costs of legal instability rise, entrenchment should deepen. Second, as the benefit of democratic responsiveness grows, entrenchment should lighten. Both ideas seem right, but they simply restate, in proposition form, the two sides in the longstanding argument. They motivate rather than resolve the debate.

This article tries to make progress. Using tools from social science, it analyzes the socially optimal level of legal entrenchment. The analysis focuses on three factors: the level of entrenchment, the costs of legal change, and the proximity of law to the preferences of today’s majority. Although scholars have long debated exactly these factors, they have not combined them in a rigorous way, and doing so yields new and surprising insights. The main ones can be summarized in five steps.

First, as legal stability becomes more valuable, entrenchment should *not* necessarily deepen. The cost of legal instability—or switching cost for short—has fixed

²¹ See Sanford Levinson, Introduction: Imperfection and Amendability, in *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 3, 3–4 (Sanford Levinson ed., 1995) [hereinafter Levinson, Introduction] (discussing Locke’s constitution for Carolina).

²² Cf. Russell Hardin, *Why a Constitution?*, in *Social and Political Foundations of Constitutions* 51, 52 (Dennis J. Galligan & Mila Versteeg eds., 2015) (“Because the consequences of a particular constitution are likely to depend to some extent on the nature of the society it is to govern, what would count as a good constitution for one society might be a poor constitution for another society.”).

and variable components. A fixed switching cost arises in a set amount every time law changes. When the 26th Amendment lowered the voting age from 21 to 18,²³ the government had to pay to reprint many forms. It would have incurred the same costs if the voting age had dropped only to 20 or jumped to 35. A variable switching cost grows with the magnitude of legal change. As government acquires more power to tax,²⁴ citizens reshuffle their work and investments in increasingly drastic ways. As variable costs rise, entrenchment should always deepen, but as fixed costs rise the relationship becomes complicated: entrenchment should deepen to a point. If entrenchment becomes too deep, *all* possible changes to law harm society.

Second, the optimal level of entrenchment depends critically on a question ignored in the current debate: who sets the agenda? Constitutional amendments do not arise spontaneously; someone is empowered to propose them. Amendments to the U.S. Constitution originate in Congress,²⁵ and nothing gets through Congress without the Speaker of the House's support.²⁶ The Speaker can propose nothing, a radical amendment, or alternatives in between. The ideal level of entrenchment depends on the Speaker's plans. If he prefers modest alternatives to the status quo, entrenchment should deepen, but if he prefers substantial change entrenchment should lighten. To restate this in counterintuitive terms, agenda setters who prefer radical constitutional change should have *greater* latitude than their incrementalist counterparts.

²³ See U.S. Const. amend. XXVI (lowering the voting age).

²⁴ See, e.g., U.S. Const. amend. XVI (empowering the federal government to levy an income tax).

²⁵ See U.S. Const. art V ("The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution[.]").

²⁶ Gary W. Cox & Mathew D. McCubbins, *Setting the Agenda* 24 (2005) ("In the case of the U.S. House, the main agenda-setting offices are the committee chairs, slots on the Rules Committee, *and the speakership.*") (emphasis added).

Third, democracy has a deep flaw. The costs of legal instability do not fall on society qua society; they fall on individuals who compose society. When law changes, members of the triumphant majority gain the *difference* between the policy benefit change brings and the switching cost they pay. Members of the minority lose the *sum* of the loss change brings and the switching cost they pay. Because of this asymmetry, the majority may gain less than the minority loses. Thus, majority rule can systematically make society worse off. Scholars have long recognized this threat when an intense minority is present.²⁷ An indifferent majority may impose severe harm on, for example, a racial minority. But the problem turns out to be omnipresent, or nearly so. It can surface every time legal instability is costly. Rational, sophisticated voters cannot fix the problem; even when they account for switching costs they may approve welfare-reducing changes to law. Thus, bare majority rule is flawed, and entrenchment usually has a place.

Fourth, judicial updating can make society better off—regardless of the level of entrenchment. Unlike an amendment, which changes law by changing legal text, judicial updating changes law by reinterpreting existing text. In holding that same-sex couples have a right to marry, the Supreme Court in *Obergefell v. Hodges* reinterpreted the existing text of the Due Process and Equal Protection Clauses.²⁸ Many scholars oppose judicial updating because they think formal amendment through Article V sufficient.²⁹ Others support updating because they consider Article V too cumbersome.³⁰ In fact, the

²⁷ See, e.g., The Federalist No. 51, at 265 (James Madison) (Ian Shapiro ed., 2009) (“If a majority be united by a common interest, the rights of the minority will be insecure.”); Derrick A. Bell, Jr., The Referendum: Democracy’s Barrier to Racial Equality, 54 Wash. L. Rev. 1, 13–22 (1978) (arguing that direct democracy imposes high costs on minorities).

²⁸ 576 U.S. ____ (2015).

²⁹ See, e.g., McGinnis & Rappaport, Good, *supra* note ____, at 85–94 (objecting to judicial updating of the Constitution).

³⁰ See, e.g., Strauss, *supra* note ____, at 1–5, 115–139 (promoting constitutional updating through common law-like adjudication).

virtues of updating do not depend on the level of entrenchment. Even when law is optimally entrenched, updating can outperform amendment. How judges should approach updating depends on switching costs: as variable costs increase, judges should temper the pace of legal change. As fixed costs increase, they should speed it up.

Fifth, constitutional law should in general trail society. As a factual matter, it does trail society, or at least many observers perceive it that way.³¹ As times change, law falls out-of-step, and it never catches up or takes awhile to do so.³² This trailing tends to benefit society. Moving a deeply unpopular law closer to the political center can maximize society's welfare, but moving it past the center—making a now-conservative law liberal or vice versa—usually cannot.

These ideas do not resolve the entrenchment debate, of course, but they represent progress. They diminish the clash of values by relating entrenchment to background conditions in a way that scholars with different beliefs and ideological views can agree on. This casts new light on the federal Constitution and on state constitutions, too. It provides guidance—still imperfect, but sharper than what came before—for statesmen and women designing constitutional regimes in Nepal, Tunisia, and elsewhere. It offers the burgeoning field of comparative constitutional law new theories to test. And it makes moves towards developing a science of entrenchment.

The paper proceeds in six Parts. Part I provides background on the debate over entrenchment. Part II provides the positive foundation for the analysis, using spatial models from social science to demonstrate the effect of entrenchment on legal change.

³¹ See, e.g., Barry Friedman, *The Will of the People* 4–7 (2009) (summarizing the argument, expressed by observers throughout American history, that the Supreme Court makes decisions at odds with popular opinion).

³² See, e.g., *id.* at 382 (“What history shows is assuredly not that Supreme Court decisions always are in line with popular opinion, but rather that they come into line with one another *over time*.”) (emphasis original).

Part III provides the normative foundation, examining the benefits of keeping law current and the costs of legal instability. Part IV combines the positive and normative work and examines the socially optimal level of entrenchment. Many of the main ideas—the relationship between entrenchment and fixed and variable switching costs, the importance of agenda setting, and so on—appear here. Part V considers a pair of complications: who bears the cost of legal change, and what happens when some citizens have more intense preferences than others? Part VI discusses implications of the work. This is where the problem of democracy and judicial updating get discussed. A short conclusions follows.

I. BACKGROUND: THE ENTRENCHMENT DEBATE

Aristotle stated that “a readiness to change from old to new laws enfeebles the power of the law.”³³ Madison called “irregular and mutable legislation . . . an evil in itself.”³⁴ Locke’s *Fundamental Constitutions*, written for the colony of Carolina in 1669,³⁵ declared: this “shall be and remain the sacred and unalterable form and rule of government . . . forever.”³⁶ These enlightened thinkers, working across centuries and contexts, reached and acted upon a common conclusion: law, and especially constitutional law, should remain stable.

³³ Aristotle, *The Politics*, bk. II, ch. 8, in *The Politics and The Constitution of Athens* 49 (Stephen Everson ed., Benjamin Jowett trans., Cambridge University Press 1996) (350 B.C.E.).

³⁴ *The Federalist* No. 37, at 181 (James Madison) (Ian Shapiro ed., 2009).

³⁵ See David Armitage, *John Locke, Carolina, and The Two Treatises of Government*, 32 *Pol. Theory* 602, 603, 607 (1994) (describing Locke’s role in Carolina).

³⁶ See Sanford Levinson, *The Political Implications of Amending Clauses*, 13 *Const. Comm.* 107, 107 (1996) (citations omitted). Locke eventually backtracked. See Armitage, *supra* note ____, at 615 (Locke later “provided for revision of the supposedly ‘sacred and unalterable’ *Fundamental Constitutions* whenever ‘the variety of human affairs’ demanded it”).

The virtues of stability are legion. It protects reliance interests³⁷ and the “security of expectations.”³⁸ Those expectations include the right to property, without which “the most violent struggles” ensue.³⁹ It tempers “the recurrent need to establish a basic framework for political life.”⁴⁰ Stability promotes reasoned deliberation and defuses “sudden and violent passions.”⁴¹ It permits governments to make credible commitments to themselves, their citizens, and other governments.⁴² The list goes on.

Constitutions provide a common mechanism for stabilizing law. As Justice Scalia wrote, the “whole purpose” of constitutions “is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.”⁴³ Of course, constitutionalizing law does not by itself buy stability.⁴⁴ The linchpin, or at least *a* linchpin,⁴⁵ of constitutional stability is a demanding amendment rule. An easy-to-amend constitution may provide little stability, while a difficult-to-amend one provides a great deal. Thus, the text of the U.S. Constitution, among the world’s hardest to amend, changes infrequently.⁴⁶ The text of California’s constitution, which can be amended with bare majority support,⁴⁷ changes often.⁴⁸

³⁷ See generally Epstein, *supra* note ____.

³⁸ Melissa Schwartzberg, *Counting the Many: The Origins and Limits of Supermajority Rule 9* (2014) (stating “institutional stability is ostensibly attractive because of the ‘security of expectations’” it affords).

³⁹ See *supra* note ____ and accompanying text.

⁴⁰ Stephen Holmes, *Passions and Constraint* 153 (1995).

⁴¹ *The Federalist* No. 62, at 315 (James Madison) (Ian Shapiro ed., 2009).

⁴² On the relationship between stability, entrenchment, and commitment, see Jon Elster, *Ulysses Unbound* 88–174 (2000).

⁴³ Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 40 (1997).

⁴⁴ Alabama, for example, changes its constitution about eight times per year. See Donald Lutz, *Toward a Formal Theory of Constitutional Amendment, in Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 237, 248 (Sanford Levinson ed., 1995).

⁴⁵ Constitutional stability also depends on other factors like the heterogeneity of voters’ preferences and the costs of political bargaining. See Michael D. Gilbert, *Entrenchment, Incrementalism, and Constitutional Collapse*, 103 *Va. L. Rev.* (forthcoming 2017) [hereinafter Gilbert, *Incrementalism*].

⁴⁶ See Lutz, *supra* note ___, at 261–65 (comparing amendment rules for the U.S. Constitution and others and concluding, “the U.S. Constitution is unusually, and probably excessively, difficult to amend”).

⁴⁷ See *Cal. Const.*, art. XVIII, §§ 3–4 (authorizing a bare majority of voters to amend the state constitution using the initiative process).

So far the discussion suggests that stability has value and constitutions should be hard to amend, but the story has another side. Getting law right presents a challenge. Washington did not consider the Constitution “free from imperfection,”⁴⁹ and Hamilton “never expect[ed] to see a perfect work from imperfect man.”⁵⁰ The challenge compounds as society evolves. Though writing in a different context, the legal realist Jerome Frank captured the idea:

The law deals with human relations in their most complicated aspects. The whole confused, shifting helter-skelter of life parades before it Even in a relatively static society, men [and women] have never been able to construct a comprehensive, eternalized set of rules How much less is such a frozen legal system possible in modern times[.]⁵¹

Jefferson argued that law must “keep pace,”⁵² and Frank reached a similar conclusion: “Our society would be strait-jacketed” if we were not constantly “overhauling the law and adapting it to the realities of ever-changing social, industrial, and political conditions.”⁵³

Now we see the tension. Stability has value, but so does modernization. Constitutions must both “function as our fundamental law” and “remain democratically responsive.”⁵⁴

⁴⁸ See, Lutz, *supra* note ___, at 248–49 (reporting that California has a higher amendment rate than most states).

⁴⁹ Levinson, Introduction, *supra* note ___, at 1 (citation omitted).

⁵⁰ The Federalist No. 85, at 442 (Alexander Hamilton) (Ian Shapiro ed., 2009).

⁵¹ Jerome Frank, *Law and the Modern Mind* 5–6 (1930, 1985). Frank focused on the common law and what we might now call judicial updating, not constitutional amendment.

⁵² See Letter from Thomas Jefferson to Samuel Kercheval, July 12, 1816 in 15 *The Writings of Thomas Jefferson* 32, 40–41 (A. Bergh ed. 1907).

⁵³ Frank, *supra* note ___, at 6–7. Again, Frank focused on judicial updating, not constitutional amendment.

⁵⁴ Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *The Constitution in 2020* 28 (Jack M. Balkin & Reva B. Siegel eds., 2009).

This tension underpins an enormous amount of work on constitutional law. Popular constitutionalism holds that citizens should take “active and ongoing control over the interpretation and enforcement of constitutional law.”⁵⁵ Living constitutionalism claims that constitutions do and should “adapt[] to new circumstances, without being formally amended.”⁵⁶ Professor Ackerman argues that the Constitution has changed without formal amendment, and that we must respect those changes,⁵⁷ while Professor Amar argues that citizens can amend the Constitution through popular vote.⁵⁸ Professor Levinson wants a convention to fix “the many structural provisions of the Constitution that place almost insurmountable barriers in the way of any acceptable notion of democracy.”⁵⁹ All of this relates directly or indirectly to responsiveness.

On the other side, jurists have spent decades developing the influential theory of originalism, which holds that the meaning of the Constitution was fixed at the time of adoption.⁶⁰ Prominent writers in this vein include Judge Bork,⁶¹ Justices Rehnquist and Scalia,⁶² Professors McConnell, Barnett, McGinnis, and Rappaport,⁶³ and the list continues.⁶⁴ Many of these scholars oppose judicial activism,⁶⁵ support demanding

⁵⁵ Larry D. Kramer, *Popular Constitutionalism*, circa 2004, 92 Cal. L. Rev. 959, 959 (2004).

⁵⁶ Strauss, *supra* note ____, at 1; see also Jack M. Balkin, *Living Originalism* 3 (2011) (developing and promoting a method of interpretation that is “both originalist and living constitutionalist”).

⁵⁷ See generally Ackerman, *supra* note ____.

⁵⁸ See generally Amar, *supra* note ____.

⁵⁹ Sanford Levinson, *Our Undemocratic Constitution* 6 (2006).

⁶⁰ For a definition of originalism, discussion of its history, and citations to classic works, see generally Whittington, *New*, *supra* note ____.

⁶¹ See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).

⁶² See, e.g., William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976); Antonin Scalia, *Originalism: The Lesser Evil*, 57 Cin. L. Rev. 849 (1989) [hereinafter *Scalia, Originalism*].

⁶³ See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001); McGinnis & Rappaport, *Good*, *supra* note ____.

⁶⁴ See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1398–401 (1992); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal. L. Rev. 167 (1996); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U.

amendment processes,⁶⁶ and object to circumvention of Article V.⁶⁷ Much of this work relates directly or indirectly to legal stability.

The tension between stability and responsiveness arises in another locus of constitutional debate: the countermajoritarian difficulty. Alexander Bickel declared judicial review a “deviant institution” because it empowers a small body of judges to invalidate the acts of democratic institutions.⁶⁸ Legal scholars have devoted more pages to this topic than perhaps any other.⁶⁹ The “difficulty” rests in part on the amendment process. If the Constitution were easy to amend, the difficulty would fade, as courts’ countermajoritarian acts could be nullified by constitutional amendment.⁷⁰

This relates to yet another controversial topic, one that wends its way through those mentioned above: judicial discretion. Constitutions may be difficult to amend, but judges can interpret and reinterpret their provisions as times change and court membership rotates. This is not coincidence: entrenchment *implies* interpretive discretion, as judges can adopt a variety of positions about constitutional meaning without facing override.⁷¹ Thus, the possibility of activism—of judges doing things

Chi. L. Rev. 519 (2003); Saikrishna Bangalore Prakash, *Imperial from the Beginning: The Constitution of the Original Executive* (2015).

⁶⁵ See, e.g., McGinnis & Rappaport, Good, *supra* note ___, at 85–94 (objecting to judicial updating of the Constitution); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 Harv. J.L. & Pub. Pol’y 5, 10–11 (1988) (criticizing judges who do not embrace originalism for “sometimes be[ing] tempted to add to or subtract from the written constitution”).

⁶⁶ See generally McGinnis & Rappaport, Good, *supra* note ___ (arguing that supermajority rules generate constitutions with good consequences).

⁶⁷ See, e.g., *id.* at 205 (criticizing Ackerman’s theory of constitutional moments for failing to generate “formal law”).

⁶⁸ Alexander Bickel, *The Least Dangerous Branch* 18 (1962).

⁶⁹ See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty*, Part Five, 112 Yale L.J. 153, 163 (2002) (stating that legal scholars “cannot stop talking about the countermajoritarian difficulty” and citing many others who have made the same observation).

⁷⁰ See Robert A. Dahl, *A Preface to Democratic Theory* 106 (Expanded ed. 2013) (“Judicial review derives its strategic importance from the difficulties of altering the Constitution by formal amendment.”).

⁷¹ See Ferejohn, *supra* note ___, at 504 (“If a constitution is difficult to amend, those officials in a position to interpret the document—whether courts, legislatures, or agencies—will have a great deal of unchecked latitude to change the constitution through interpretation.”).

beyond the four corners of the law, for good or for ill—depends on the balance between stability and democratic responsiveness. A constitution designed for stability, with demanding amendment rules, vests judges with discretion.

As this brief tour shows, many of the enduring debates in constitutional law relate to the balance between stability and responsiveness. In a word, they relate to entrenchment, the degree to which a constitution is insulated from formal legal change. Amendment rules play a key role in determining a constitution’s entrenchment, and so one might suppose amendment rules have attracted scholars’ attention. This is partially correct. Social science-minded scholars have done valuable work, providing theories and evidence on how amendment rules operate.⁷² But on the normative question that preoccupies legal scholars—what is the optimal level of entrenchment given the value of stability?—research is thin. Scholars make assertions, claiming, for example, that Article V is too strict,⁷³ but they provide little basis for such conclusions. Intuitions do much (perhaps all) of the work.

⁷² See, e.g., James M. Buchanan & Gordon Tullock, *The Calculus of Consent* 85–96, 211–31 (1962) (presenting the germinal analysis of qualified majority rules, including the unanimity rule, and identifying the tradeoff between decision-making costs and “external” costs); Dennis C. Mueller, *Constitutional Rights*, 7 *J.L. Econ. & Org.* 313 (1991) (studying voting thresholds and transaction costs); Ruth C. Ben-Yashar & Shmuel I. Nitzan, *The Optimal Decision Rule for Fixed-Size Committees in Dichotomous Choice Situations: The General Result*, 38 *Int’l Rev. L. Econ.* 175 (1997) (studying voting thresholds and decision-making skill); Yves Balasko & Hervé Crès, *The Probability of Condorcet Cycles and Super Majority Rules*, 75 *J. Econ. Theory* 237 (1997) (studying voting thresholds and Condorcet cycling); Dennis C. Mueller, *The Importance of Uncertainty in a Two-Stage Theory of Constitutions* 108 *Public Choice* 223 (2001) (studying voting thresholds and uncertainty); Mark Fey, *A Note on the Condorcet Jury Theorem with Supermajority Voting Rules*, 20 *Social Choice & Welfare* 27 (2003) (studying voting thresholds and information aggregation); Rosalind Dixon & Richard Holden, *Constitutional Amendment Rules: The Denominator Problem*, in *Comparative Constitutional Design* 195 (Tom Ginsburg ed., 2011) (studying voting thresholds, legislative size, and the rate of constitutional amendment); Brett Graham & Dan Bernhardt, *Flexibility vs. Protection from an Unrepresentative Legislative Majority*, 93 *Games & Econ. Behavior* 59 (2015) (studying voting thresholds and misrepresentation by legislators); Richard Holden, *Supermajority Voting Rules* (unpublished manuscript, July 31, 2015) (studying relationship between voting thresholds and size of decision-making body).

⁷³ See, e.g., Strauss, *supra* note ____, and accompanying text; Post & Siegel, *supra* note ____, at 28 (“Article V amendments . . . cannot provide an effective avenue for connecting constitutional law to popular commitments.”);

Professors McGinnis and Rappaport present an exception. They have written many valuable, normative works on constitutional amendment and supermajority rules. But even they remain very uncertain about the ideal level of entrenchment. In their recent book, the culmination of more than a decade's effort, they report that achieving certain constitutional goals "ordinarily requires a supermajority rule [for amendment] in the range of at least two-thirds or three-quarters."⁷⁴

Two tendencies stifle headway on these matters. First, legal scholars rush to judgment. We assess and critique amendment rules (and other legal phenomena) with only a basic understanding of their likely consequences. Second, we suffer from what might be called "value creep." Before the ink dries on the debate over stability and responsiveness, we introduce new complications, like the importance of consensus,⁷⁵ veils of ignorance,⁷⁶ politicization,⁷⁷ the link between amendment and judicial legitimacy,⁷⁸ and so forth. These ideas may well matter, but we have layered them on an unstable foundation.

This paper aims to make progress by returning to the central, fundamental choice between stability and responsiveness.

⁷⁴ McGinnis & Rappaport, Good, *supra* note ____, at 37.

⁷⁵ See *id.* at 38–39 (stressing the importance of consensus as a distinct consequentialist and constitutional value).

⁷⁶ See *id.* at 42–43 (arguing that entrenchment creates a veil of ignorance that generates entrenchments with good consequences).

⁷⁷ Kathleen Sullivan, Constitutional Amendmentitis, *The American Prospect* (Fall 1995) (opposing constitutional amendments because they "trivialize or politicize the Constitution," especially when they "embed in it a controversial substantive choice").

⁷⁸ See *id.* (stating "Increasing the frequency of constitutional amendment would undermine the respect and legitimacy the Court now enjoys," which would create "danger"). For criticism of Professor Sullivan's arguments, see Adrian Vermeule, Constitutional Amendments and the Constitutional Common Law, 229, 242–56, in *The Least Examined Branch* (Richard W. Bauman & Tsvi Kahana eds., 2007) [hereinafter Vermeule, Amendments].

II. POSITIVE FOUNDATIONS⁷⁹

This Part examines the relationship between entrenchment and legal development. The analysis is positive. I do not celebrate or critique entrenchment, I just expose its mechanics and effects on law. To do this work I use an analytical technique called spatial modeling, which is common in social science but less so in legal scholarship.⁸⁰ Spatial modeling allows one to capture and analyze interesting and important ideas with simple figures (and without confusing equations and math). Spatial models make precise what words often leave vague.

A. A Model of Majority Rule

Start with a thought experiment. Suppose three legislators decide on the immigration quota, meaning the number of immigrants permitted to enter the country in a given year. They prefer quotas of 10,000, 20,000, and 30,000, respectively. Each legislator wants the quota to be as close to his or her preference as possible. If the quota starts at, say, 10,000, the second and third legislators will vote to increase it. Both prefer a higher figure, and by majority rule they will prevail. If the quota starts at, say, 30,000, the first and second legislators will vote to decrease it, as both prefer a lower figure.

The second legislator holds all of the power. To see why, suppose the quota equals 20,000, the second legislator's ideal. The first and second legislators will oppose

⁷⁹ Part II synthesizes ideas developed at length in separate work. See Gilbert, *Incrementalism*, *supra* note _____. The remainder of this paper is original.

⁸⁰ In social science, see, for example, Keith Krehbiel, *Pivotal Politics* 20–48 (1998) (employing spatial models); David W. Brady & Craig Volden, *Revolving Gridlock* 12–48 (2d ed. 2006) (same); George Tsebelis, *Veto Players* (2002) (same). In law, see, for example, William N. Eskridge, Jr., *Reneging on History: Playing the Court/Congress/President Civil Rights Game*, 79 *Cal. L. Rev.* 613, 641–64 (1991) (employing spatial models); Robert D. Cooter, *The Strategic Constitution* 25–41, 154–61, 215–39 (2000) (same); Michael D. Gilbert & Joshua M. Levine, *Less Can Be More: Conflicting Ballot Proposals and the Highest Vote Rule*, 38 *J. Legal Stud.* 383, 389–93, 398–401 (2009) (same).

any effort to increase the quota, and the second and third will oppose any effort to decrease it. In both cases, a majority opposes any change. The second legislator, the one in the middle, gets her way.

In this example, law gravitates toward the political center. This tendency is not limited to my scenario; in a broad range of circumstances law behaves exactly this way. The following paragraphs develop a model of legal change under majority rule that shows why.

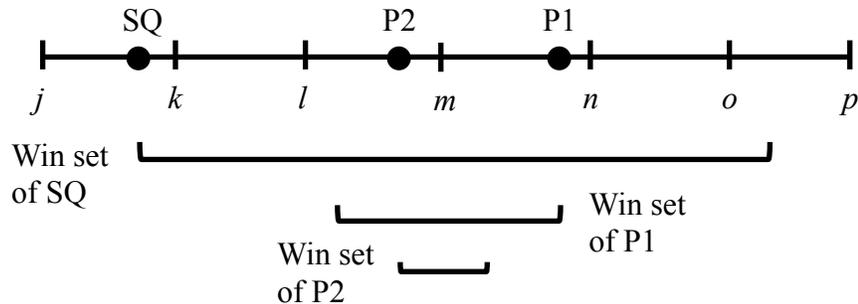
Suppose that seven voters—members of a legislature, for example—make laws.⁸¹ They use majority rule, meaning the proposal with four or more votes wins,⁸² and they make choices in pairwise fashion, meaning they choose between two proposals at a time, the status quo and an alternative. They cast separate votes on issues. To illustrate, they would cast individual votes on proposals involving immigration and sugar subsidies, not one vote on both.⁸³ This assumption allows the voters to be situated on a policy dimension stretching from left to right, as in Figure 1. The dimension is general. It could represent the stringency of counterterrorism procedures, levels of greenhouse gas emissions, speech rights, abortion rights, limits on campaign contributions, or whatever else.

⁸¹ Seven is a handy number, but so long as there is a unique median the number does not matter. There could be one million and seven voters.

⁸² I assume no voter abstains.

⁸³ Congress and other legislatures often pass multi-issue bills, but multi-issue constitutional amendments are rarer, in part because of “single subject rules,” which exist in the United States and around the world. See generally Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 *U. Pitt. L. Rev.* 803 (2007) (discussing the single subject rule as applied to legislation in the American states); Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 *Colum. L. Rev.* 687 (2010) (discussing the single subject rule as applied to constitutional initiatives); Michael D. Gilbert, *Does Law Matter? Theory and Evidence From Single Subject Adjudication*, 40 *J. Legal Stud.* 333, 345–46 (2011) (finding evidence that single subject rules deter multi-issues ballot initiatives, including constitutional initiatives).

Figure 1



The voters have names— j , k , l , m , n , o , and p —and they appear at their ideal points.⁸⁴ A voter’s ideal point represents her most preferred policy. To illustrate with the prior example, suppose the dimension represents immigration quotas, which increase as we move rightward. Voter j most prefers a low quota—say, 10,000 immigrants per year—while voter l prefers a quota like 30,000 and p one like 70,000. The voters always prefer policies closer to their ideal points.⁸⁵ Consider voter l . She prefers a quota of 30,000 (her ideal outcome) to 20,000 (which differs from her ideal by 10,000). She prefers a quota of 20,000 (differs from her ideal by 10,000) to 50,000 (differs from her ideal by 20,000). Voter l is equally unhappy whether the quota is 25,000 or 35,000 (both differ from her ideal by 5,000).

⁸⁴ Each voter has a unique ideal point. The voters are evenly spaced in Figure 1, but only for clarity. They could be uneven—clustering near the middle, for example, with a few on the ends—and the analysis would not change.

⁸⁵ To be precise, the voters have single-peaked, symmetrical preferences. These are common assumptions. See, e.g., Krehbiel, *supra* note ____, at 21–28; Cooter, *supra* note ____, at 23–27; Gilbert & Levine, *supra* note ____, at 389–90. Of course, the assumptions may not always be accurate. See Cooter, *supra* note ____, at 38–39 (providing an example of “yuppies” with double-peaked preferences); Michael D. Gilbert, *Insincere Rules*, 101 *Va. L. Rev.* 2185, 2211 (2015) (discussing asymmetric preferences and providing an example: “Parents who prefer an 8:30 bedtime may suffer much more if their children turn off the lights at 9:00 than if they turn them off at 8:00”). For a fuller discussion of these assumptions, see Gilbert, *Incrementalism*, *supra* note ____, at ____.

Suppose the status quo law equals the point labeled SQ. Given the choice between SQ and the proposed law P1, a majority prefers P1. For voters m , n , o , and p , P1 lies closer to their ideal points, so they support it.

P1 is not the only alternative that a majority prefers to SQ. Every point in the *win set* of SQ would defeat the status quo. For example, suppose SQ gets paired with a proposal equal to voter l 's ideal point. Five voters, l through p , prefer that proposal. Suppose instead that SQ gets matched with a proposal at n . Four voters, m through p , prefer that proposal to SQ. At least four voters prefer every point in the win set of SQ to the status quo.

Suppose P1 replaces SQ. P1 becomes the new status quo, and every point in the win set of P1 would defeat it. To demonstrate, a majority of voters, j through m , prefer P2 to P1. P2 becomes the new status quo, and yet another win set opens.

This process repeats until the law equals m , the ideal point of the median voter, meaning the voter in the middle.⁸⁶ Once there, law stabilizes. To see why, consider a proposal to replace a status quo at m with a law left of m . No more than three voters, j , k , and l , would support this proposal, and it takes support from at least four voters to make a change. The same logic prevents changes from m to a point on the right. Under our assumptions, law converges to the median voter's ideal point and then sticks. This is the median voter theorem.⁸⁷

The median voter theorem is a mainstay of social science, and it has great explanatory power. It helps explain, for example, the tendency of presidential candidates

⁸⁶ To be precise, the median voter has an equal number of voters on either side. I assume there is a unique median.

⁸⁷ See generally Anthony Downs, *An Economic Theory of Democracy* (1957); Duncan Black, *The Theory of Committees and Elections* (1958). For an accessible discussion, see Kenneth A. Shepsle, *Analyzing Politics* 91–99 (2d ed. 2010).

to pander to the center of their parties during primary elections and to the center of the nation as a whole during general elections. For my purposes, I use the theorem to develop a point about law and democratic responsiveness.

Law in this model is not entrenched. Changing law does not require supermajority support; it does not even require approvals from multiple bodies like the House and Senate. Because of this, law converges on the median voter. Thus, we can say that un-entrenched law is responsive to the median. The debate about entrenchment, however, is not about making law *median* responsive but, as Professors Post and Siegel write, making it “*democratically* responsive.”⁸⁸ What is the relationship between the median and democracy?

The median voter’s ideal point is the unique equilibrium, meaning the only point where law stabilizes. A law equal to m defeats every possible alternative in a pairwise vote. No other law has that feature. This gives the median special claim to being the majoritarian choice: a majority prefers it to every alternative.⁸⁹ Democracy is complicated, but it is often associated with majoritarianism. Under any conception of democracy that prioritizes majoritarianism, making law median responsive implies that law is democratically responsive.

Thus, I can summarize: under simple and common assumptions, un-entrenched law converges on the median voter’s preference. What the median prefers a majority prefers, and so un-entrenched law is democratically responsive.

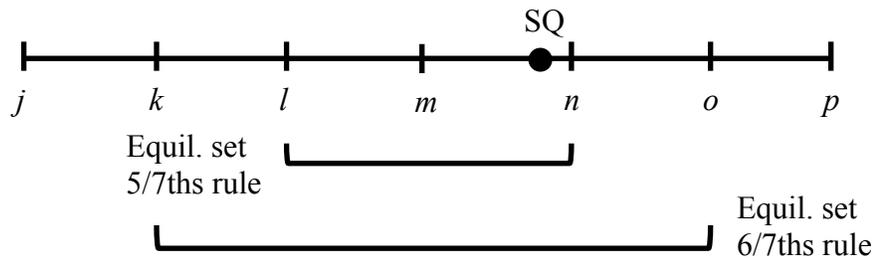
⁸⁸ Post & Siegel, *supra* note ____, at 28 (emphasis added).

⁸⁹ See Michael D. Gilbert, *Interpreting Initiatives*, 97 *Minn. L. Rev.* 1621, 1634 (2013) [hereinafter Gilbert, *Interpreting*] (A proposal that defeats all others “can be said to capture, in a concrete way, majority will If a decision-making process fails to select” that proposal, “then majority will has not been actualized”).

B. A Model of Supermajority Rule

This section repeats the analysis above with one change: the voters do not use a 4/7ths majority rule but instead a 5/7ths supermajority rule. Thus, law is (relatively) entrenched. Consider Figure 2, and suppose the status quo law equals m , the median voter's ideal point. As before, law is stable, as no more than three voters would support a move to the left or to the right. Instead of m , suppose the law starts at SQ. No more than four voters would support a change leftward, and no more than three would support a change rightward. It takes five votes to replace SQ, so SQ is stable. To generalize, every point between l and n is stable.

Figure 2



Note the key difference between majority and supermajority rule. Under the former, law has a single equilibrium point, m . Law will converge on that exact point and then stick. Under supermajority rule, law has an equilibrium *set*. The law can fall anywhere in that set and remain stable. Thus, law may not converge on the median.⁹⁰ If law starts at SQ, it remains there, even though it does not match the median. If the law starts outside the set—at o , for example—a supermajority will vote to move it inside the set. For example, voters j through n would vote to replace a law at o with a law at n . But

⁹⁰ Many others have made this point. See, e.g., Cooter, *supra* note ____, at 231–34.

as this example shows, the new law at n , though inside the set, may not match the median.

Now relate these ideas to democratic responsiveness. As discussed, unentrenched law exactly tracks the median, making it democratically responsive. Entrenched law, on the other hand, does not exactly track the median. It stays within the equilibrium set, which is like a band around the median, but it may not always—or ever—match the median. Thus, entrenched law is not as democratically responsive.

To sharpen the logic, consider an example. Suppose the law in question involves rights for same-sex couples. The law started at the median voter's ideal point, but over time the voters' views on this issue became more liberal. In Figure 2, the ideal points of all seven voters shifted leftward on the line. Relative to those ideal points, the law, SQ, shifted to the right of the median, as pictured. Under majority rule, the law would converge on the political center, meaning it would become more protective of same-sex couples' rights. Under supermajority rule, however, the law stays fixed at SQ. A majority wants something more liberal, but law does not respond.

The degree of democratic unresponsiveness depends on the depth of entrenchment. Return again to Figure 2, and suppose the voters switch from a 5/7ths to a 6/7ths supermajority rule, meaning entrenchment deepens. The equilibrium set widens, stretching from k to o .⁹¹ Law can stray even further from the median and remain stable.

⁹¹ Likewise, the size of the set depends on the distribution of ideal points. Suppose the voting rule remains 6/7ths. If voters k, l, m, n , and o cluster in the middle, the equilibrium set narrows. If they disperse, with j, k, l on the far left and n, o, p on the far right, the set widens. See Gilbert, Incrementalism, *supra* note ____ (describing this idea and labeling it the heterogeneity principle).

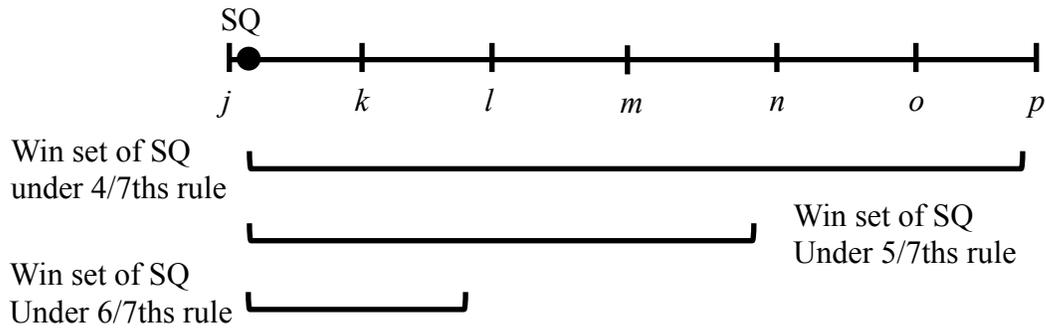
C. The Incrementalism Principle

So far I have used spatial models to show that entrenchment reduces democratic responsiveness. It does so by creating an equilibrium set. Law within that set cannot change, even if it does not match the median. Although they do not use this terminology, legal scholars already understand this idea. Most do not, however, understand the next one. Entrenchment reduces responsiveness in two ways, not one. It inhibits law from changing, even if law does not match the median, *and* it makes changes that do take place incremental.

Figure 3 demonstrates. Suppose the status quo law labeled SQ began at the median voter's ideal point. However, the voters' views evolved, and they all moved rightward on the line. Relative to voters, the law shifted leftward, thus SQ appears left of m . Whether the voters use majority rule, a 5/7ths rule, or a 6/7ths rule, SQ does not lie in the equilibrium set. Thus, SQ can be replaced. But by what? The answer depends on the voting rule. Under majority rule, any proposal in the first, wide win set of SQ would defeat SQ. A majority prefers every point in that set to SQ. Law could move, for example, from SQ to a point close to p .⁹² If, however, the voters use a 5/7ths supermajority rule, then only those proposals in the second, narrower win set would defeat SQ. Those proposals alone make at least five voters better off. Law could move to m , or it could move close to n , but it could not reach o or beyond. Under a 6/7ths rule, only those proposals in the last, narrowest win set would defeat SQ. Law could move to k or a point close to l , but no more.

⁹² Of course, law would not be stable near p . The median voter theorem teaches that law will remain unstable until it reaches m . See *supra* Part II.A.

Figure 3



As entrenchment deepens, the win set narrows. Not only does it narrow, it collapses on the status quo. Hence the claim that entrenchment forces law to change incrementally. From SQ, law can change a lot under majority rule, some under a 5/7ths rule, and very little under a 6/7ths rule. That last rule, 6/7ths, illustrates starkly. The largest amendment to SQ that would command the necessary six votes would move law from its starting point near *j* to the end of the win set, just left of *l*. Law strayed from the median to start, and deep entrenchment prevents it from getting back.

This idea may come naturally to readers familiar with spatial models. Others may be perplexed. Revisiting the immigration example, and using concrete numbers, may help. Suppose the immigration quota equals 9,000, and three legislators have authority to change it. They prefer quotas of 10,000, 20,000, and 30,000, respectively. If the legislators make decisions using majority law—the law is not entrenched—they may make the quota 20,000. Two of three legislators prefer 20,000 to 9,000. If, however, the legislators require unanimous agreement to change the quota—the law is entrenched—they cannot make such a drastic move because the first legislator opposes it. That legislator may support an incremental increase from 9,000 to 10,000, but not a substantial increase to 20,000.

To generalize from this example, entrenchment forces more and more decision-makers to agree before law can change. Some of them will be relatively happy with the status quo. To get them to agree to a change will require making them even happier, and making them even happier requires fine-tuning—going from 9,000 to 10,000, for example—not wholesale change.

This idea has a name: the incrementalism principle.⁹³ As entrenchment deepens, potential changes to law become more and more incremental in character.

D. Coda: Generalizing from the Model

The model focuses on just seven voters operating under majority and supermajority rules. In reality, there are often many more voters, and they make collective decisions under a bewildering variety of rules. Bicameralism,⁹⁴ executive presentment,⁹⁵ voter approval requirements,⁹⁶ absolute majority rules,⁹⁷ filibusters⁹⁸—all of these institutions and others are used to entrench law. Can the simple model cast light on these real-world scenarios? The answer is yes. Amending entrenched law requires a certain number of actors to agree. One can represent these actors and the rules that govern them on the line. Thereafter, institutional details disappear, and a simple, general model remains.⁹⁹ The general model has exactly those features highlighted above.

⁹³ See Gilbert, Incrementalism, *supra* note ____, at ____.

⁹⁴ See, e.g., U.S. Const. art. I, §§ 1, 7 (providing for bicameralism).

⁹⁵ See, e.g., U.S. Const. art. I, § 7 (providing for presentment).

⁹⁶ See, e.g., Ida. Const. art XX, § 1 (amending Idaho’s constitution requires two-thirds support in both legislative chambers and majority support from “the electors of the state”).

⁹⁷ See generally Adrian Vermeule, Absolute Majority Rules, 37 *Brit. J. Pol. Sci.* 643 (2007) (discussing absolute majority rules).

⁹⁸ See Krehbiel, *supra* note 80, at 22–23 (discussing the filibuster as a supermajoritarian rule).

⁹⁹ This is the central insight of an important book. See Tsebelis, *supra* note ____, at 1–37.

I demonstrate this generality in a separate paper.¹⁰⁰ Rather than reproducing that work, I will continue to focus on the simple, seven-voter case. It yields ideas that apply in other, realistic entrenchment settings.

III. NORMATIVE FOUNDATIONS

The last Part focused on positive matters: how entrenchment works, and what it does to law's development. The debate over entrenchment, however, is normative. Scholars claim that entrenchment promotes stability, which is *good*, but undercuts democratic responsiveness, which is *bad*. To connect the positive analysis to the normative debate requires two things: a metric for assessing good and bad, and a way of capturing that metric in the spatial model.

On the metric, one can conceptualize good and bad in terms of society's well-being, or social welfare for short.¹⁰¹ A standard way of thinking about social welfare is to think about the welfare or "utility" of the individuals who compose society.¹⁰² When the sum of their utility increases, social welfare improves, and vice versa.

An individual's utility may depend on many things, like health, wealth, social standing, and so forth. I focus on two elements of utility relevant for present purposes: the responsiveness of law and switching costs. When law gets closer to voters' preferences, their utility increases. When changing law imposes costs on voters, their utility declines. The following sections elaborate.

A. Social Welfare and Democratic Responsiveness

¹⁰⁰ See Gilbert, Incrementalism, *supra* note ____, at ____.

¹⁰¹ See Matthew Adler, Well Being and Fair Distribution 79–84 (2012).

¹⁰² See *id.*

Law should be democratically responsive. To restate with more precision, social welfare increases when law responds to voters and decreases when it does not. This seems intuitive, and the logic holds under the following assumptions, which the spatial model captures. First, voters are distributed symmetrically—for every voter left of the median by a certain distance there exists a voter right of the median by the same distance. All of the preceding figures demonstrate this symmetry.¹⁰³ Second, the intensity of voters' preferences is symmetrical. Pick an issue, like immigration quotas. For every voter left of the median on this issue, whether he or she cares about quotas strongly or weakly, the voter equidistant from the median on the right cares equally strongly or weakly. Voter *k*, for example, cares as much (or little) as voter *o*.

The second assumption is strong. It may clash with intuitions about constitutionalism, which often aims to protect minorities whose preferences are more intense than other citizens'. Part V.B relaxes that assumption. For now, I maintain the assumption because it facilitates progress.

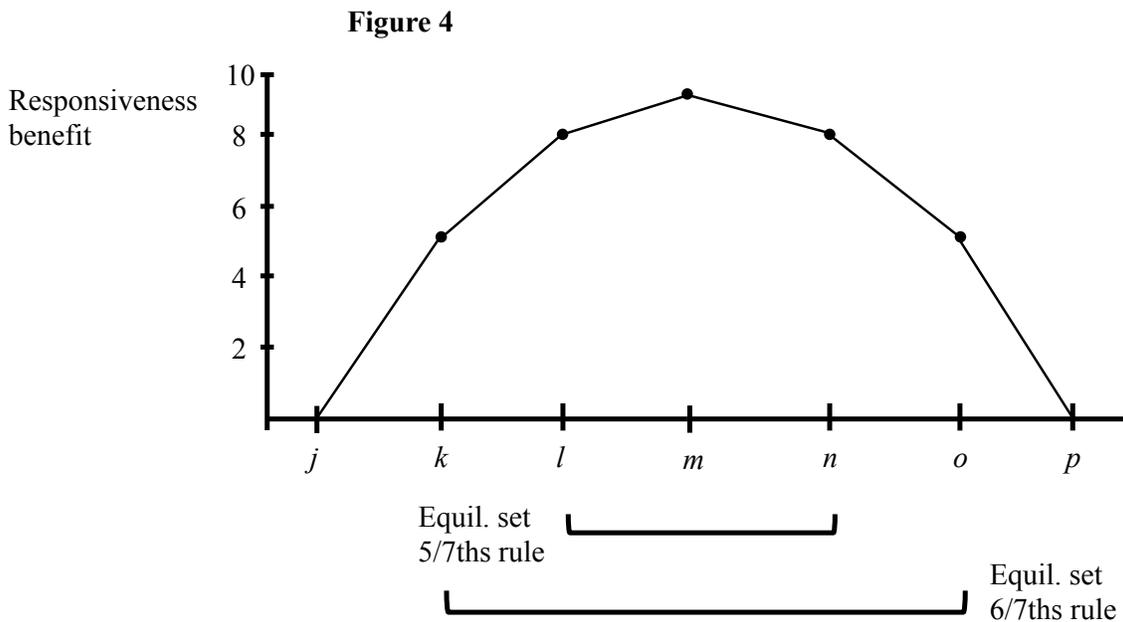
Under these assumptions, law converges on the median. This *maximizes* the voters' utility.¹⁰⁴ To see why, suppose the law matches the median voter's ideal point, and suppose we shift law just to the left. Three voters, *j*, *k*, and *l*, gain while the other four suffer. Because of the symmetry assumptions, the net effect is a decline in utility.¹⁰⁵ The same would hold if law shifted right of the median.

¹⁰³ Symmetry was not required for the positive analysis presented in Part II. See supra note _____. However, it is required for the normative analysis presented here.

¹⁰⁴ See Cooter, supra note ____, 33–34; cf. Douglas W. Rae, Decision–Rules and Individual Values in Constitutional Choice, 63 Am. Pol. Sci. Rev. 40 (1969).

¹⁰⁵ The gains to *j* exactly offset the losses to *p*. Likewise, the gains to *k* and *l*, respectively, exactly offset the losses to *o* and *n*, respectively. That leaves *m*, whose losses are not offset, which means aggregate utility declines.

If setting law at the median maximizes the voters' utility, moving law closer to the median must increase it. However, moves of equal distance do not have the same implications. The curve in Figure 4 demonstrates. Assume that each voter gains one "util" when law moves one ideal point closer to his or her own and vice versa. From a status quo of j , moving law to k will help six voters and hurt one, leading to a net gain of five. Moving from k to l helps five voters and hurts two, leading to a net increase in three. Moving from l to m helps four and harms three, increasing utility by one. These changes are additive. Moving from j to m increases utility by nine,¹⁰⁶ while moving from k to n increases it by three.¹⁰⁷



Now relate the positive analysis of entrenchment to the normative value of democratic responsiveness. Un-entrenched law, meaning law changeable by a majority,

¹⁰⁶ This move decreases j 's utility by three and k 's by one. It increases l 's utility by one and m 's, n 's, o 's, and p 's by three. The net gain equals nine.

¹⁰⁷ This move decreases j 's and k 's utility by three and l 's by one. It increases m 's utility by one and n 's, o 's, and p 's by three. The net gain equals three.

is democratically responsive. It converges on the median voter. This is good because setting law at the median maximizes utility, as the curve in Figure 4 shows: it peaks at m . Entrenched law is not as democratically responsive. Entrenchment creates an equilibrium set. The deeper entrenchment becomes, the wider the set, meaning the farther from the median law can go. This is bad because setting law at any point other than the median fails to maximize utility. To illustrate, suppose the voters in Figure 4 use a 6/7ths voting rule, and suppose the status quo law equals k . That law lies in the equilibrium set, so it cannot change. The lack of responsiveness costs society. Switching to majority rule would make law responsive, and it would move to m . That change would increase utility from five to nine.

B. Social Welfare and Switching Costs

The last section demonstrated the downside of entrenchment: it makes law unresponsive to democratic majorities, harming society. This section examines the principal upside: stability. As Madison wrote, “Stability in government is essential to national character and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people.”¹⁰⁸ If stability has benefits, then instability must have costs. Put differently, changing law imposes costs on citizens, reducing their utility and therefore reducing social welfare.

Consider those costs. New laws must be researched, which often requires experts to testify, lobbyists to cajole, and legislators to listen. They must be drafted, reviewed, amended, and voted on, which requires time and resources from legislators and their staffs. New laws must be implemented, which requires training for enforcement agents,

¹⁰⁸ The Federalist No. 37, at 181 (James Madison) (Ian Shapiro ed., 2009).

adapting by lawyers and regulated parties, and adjudicating in court. To demonstrate that last point, consider the Affordable Care Act. Passage of that law remade the market for health insurance, causing states, insurers and millions of consumers to change their behavior.¹⁰⁹ It also triggered rule-making by bureaucrats,¹¹⁰ disputes in state and federal court,¹¹¹ and at least one statewide ballot initiative.¹¹²

Changing law comes with other costs that lawyers fear—so much that they feature in every law student’s education. Changing law can squander reliance.¹¹³ A whiskey distillery built today becomes inoperable when a constitutional prohibition on alcohol gets enacted tomorrow.¹¹⁴ Farmers must change their facilities and practices, possibly in drastic ways, when voters approve new laws on the treatment of chickens and pigs.¹¹⁵

Looking ahead, shifts in law may undermine predictability.¹¹⁶ However stable parties thought law was before, they may think it less stable after a change. That undermines their ability to plan—or more precisely, causes them to incur extra costs to

¹⁰⁹ See generally David Blumenthal, Melinda Abrams, & Rachel Nuzum, *The Affordable Care Act at 5 Years*, 372 *New. Engl. J. Med.* 2451 (2015).

¹¹⁰ See generally Nicholas Bagley & Helen Levy, *Essential Health Benefits and the Affordable Care Act: Law and Process*, 39 *J. Health Politics, Pol’y, & Law* 441 (2014) (describing agency rulemaking and other actions under the Affordable Care Act).

¹¹¹ See, e.g., *National Federation of Independent Business v. Sebelius*, 567 U.S. ____ (2012) (upholding the individual mandate in the Affordable Care Act against a constitutional challenge).

¹¹² See Gilbert, *Interpreting*, *supra* note ____, at 1621–22 (describing Issue 3, a ballot initiative that tried unsuccessfully to undercut the individual mandate in the Affordable Care Act and that had other, surprising implications).

¹¹³ See generally Epstein, *supra* note ____.

¹¹⁴ See U.S. Const, amend XVIII, § 1 (prohibiting “manufacture, sale, or transportation of intoxicating liquors”).

¹¹⁵ See Dan Charles, *How California's New Rules Are Scrambling The Egg Industry*, NPR.org, Dec. 29, 2014 (describing Proposition 2, which was enacted by popular vote, and which gave “a shock to the egg industry, and to grocery stores” by requiring better treatment of chickens); *Pregnant Pig Amendment Taking Effect*, *Tampa Bay Times*, Nov. 2, 2008 (stating that as a result of an amendment to Florida’s constitution requiring better treatment of pigs, “Florida’s only two hog operations that would have been affected went out of business”).

¹¹⁶ See, e.g., Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 *Mich. L. Rev.* 1, 4 (2012) (equating “constancy and predictability in the law” with “rule-of-law ideas”); Joseph Raz, *The Rule of Law and Its Virtue*, in *The Authority of Law* 213 (Joseph Raz ed., 1979) (“[T]he law should be such that people will be able to be guided by it”).

address uncertainty while planning. Current events exemplify this idea. Following British citizens' surprise vote to exit the European Union, employers, investors, and many others in the United Kingdom and throughout Europe must spend time and money planning for future uncertainty in a way they previously did not.¹¹⁷

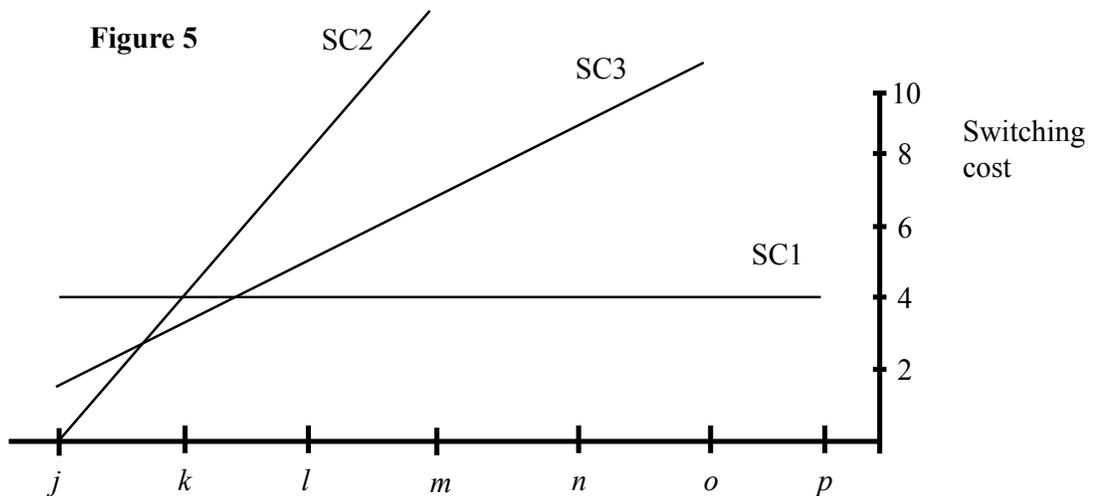
In the paper that spawned his famous theorem, Ronald Coase lumped all impediments to bargaining under one heading, "transaction costs."¹¹⁸ In a similar (if less grand) move, I refer to all costs of legal change as "switching costs." Switching costs capture all of the things that jurists worry about when defending stability and opposing legal change.

Switching costs divide into two categories, fixed and variable. Fixed costs accrue in the same amount every time law changes, whether the change is small or large. To give an example, cash registers must be reprogrammed, and reprogramming costs the same amount of time and money, whether the sales tax changes by one percentage point or ten. Likewise, elections officials must change their forms and procedures if the voting age jumps from 18 to 19 or to 29. Variable costs accrue with the magnitude of legal change. As the sales tax rises, consumers make increasingly drastic changes to their consumption patterns. As the voting age rises, politicians make greater changes to their platforms, and citizens make greater adjustments to their lives in anticipation of new representation and policies.

¹¹⁷ Steven Erlanger, Britain Votes to Leave E.U.; Cameron Plans to Step Down, N.Y. Times, June 23, 2016 (describing the vote as a "stunning turn of events . . . accompanied by a plunge in the financial markets" and carrying "profound implications for Britain's legal system . . . and for Britain's economy").

¹¹⁸ See generally Ronald Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960). Coase did not use the phrase "transaction costs," but many others have. See, e.g., Robert Cooter, The Cost of Coase, 11 J. Legal Stud. 1, 14 (1982) ("The basic idea of the [Coase] theorem is that the structure of the law which assigns property rights and liability does not matter so long as transaction costs are nil[.]").

The spatial model can accommodate switching costs. Consider Figure 5, and assume the status quo law equals j . Moving law away from j would create switching costs. If those costs are fixed, then the magnitude of legal change does not matter. The line labeled SC1 illustrates. Moving from j to any point always creates a switching cost of four. If switching costs are variable, then the magnitude of legal change does matter, as the line SC2 shows. Starting at j , switching costs get larger as law moves further to the right. In reality, changes to law often come with both fixed and variable costs. The line SC3 illustrates. It starts above the horizontal axis (like SC1), meaning there are fixed switching costs, and it slopes upwards (like SC2), meaning there are variable switching costs.



IV. OPTIMAL ENTRENCHMENT

What is the optimal level of entrenchment? “Optimal entrenchment” implies normativity. The question is not whether entrenchment increases stability or undercuts responsiveness. The question is, given those competing concerns, what degree of entrenchment is best for society? What degree maximizes social welfare?

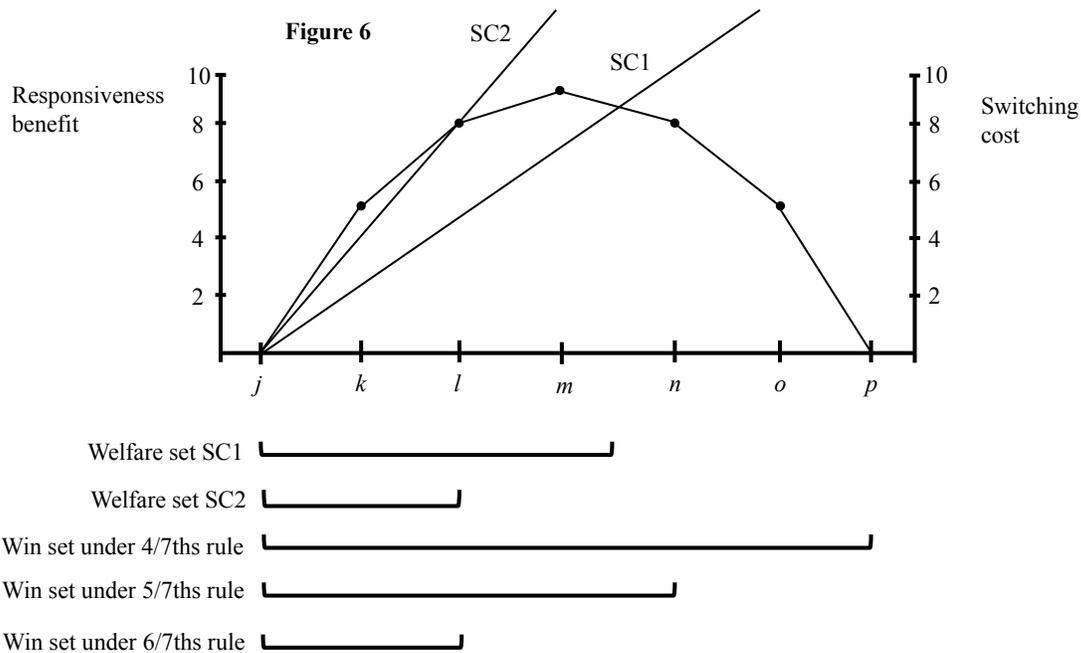
If social welfare depended only on voters’ policy preferences, then simple majority rule would be optimal. Law would converge on the median voter and maximize utility. If social welfare depended only on switching costs, then unalterable law would be best: law should never change. In fact, social welfare depends on both. Under this account, welfare increases when law moves closer to the median voter and when switching costs decline. To restate this idea, given a menu of possible legal changes, society should select the one that maximizes the difference between the gains from responsiveness and the switching costs. The following pages examine this idea in detail.

A. Entrenchment and Variable Switching Costs

Recall that switching costs come in two forms, fixed and variable. Most changes to law probably come with both kinds of costs. As the sales tax increases, fixed costs accrue (registers need reprogramming) and variable costs do too (consumers change their behavior in accordance with the size of the tax increase). To begin, I will examine the two costs in isolation, beginning with variable. Later I will combine them.

Consider Figure 6, and assume the status quo law equals j . Perhaps the law started at j , or perhaps it started at m but then the voters’ preferences changed. In any case, the law now lies at j . The curve shows the gains to be had from making law more

democratically responsive. The line, SC1, shows the variable switching cost associated with changing law.¹¹⁹ For small changes (from j to a point just to its right) the switching cost is low, while for large changes (from j to m , for example) the switching cost is relatively high.



Some changes to law would increase welfare while others would decrease it. Consider the move from j to n . That would create responsiveness gains of eight, as the curve shows, but generate switching costs of about ten, as SC1 shows. Society is better off with j , even though it lies far from the median, because the costs of change are too great. Other changes would increase welfare. Moving from j to k would create gains of five and generate switching costs of about two, for a net gain in social welfare of three.

¹¹⁹ For simplicity, I assume that increases in variable switching costs are linear. Non-linearity would not affect the basic analysis as long as the function is monotonic.

This is not the only change that would increase welfare. Moving from j to any point in the *welfare set* SC1 would increase welfare. The set captures all of the moves for which the gains from change outweigh the costs.

Although moving from j to any point in the welfare set increases welfare, only one move, from j to l , *maximizes* it. At l , the gap between the utility gain and the switching cost is greatest.

Given the welfare set SC1, what voting rule is best? Majority rule would permit changes from j to any point in the 4/7ths win set. Many of those changes—from j to o , for example—would decrease welfare. Whether that poses a danger depends on the agenda setter. An agenda setter is an actor empowered to propose changes to law. In the U.S. Congress, for example, the Speaker of the House acts as an agenda setter, deciding which bills appear on the chamber’s agenda and get a vote.¹²⁰ If the agenda opposes o , she will not permit a vote on a proposal to move law to o . Consequently, a majority of voters would never have a chance to enact o . If, on the other hand, the agenda setter favors o , then majority rule is problematic. She will propose, and a majority of voters will support, moving law to o . Social welfare declines.¹²¹

This leads to an important point: entrenchment only affects the range of alternatives that can replace the status quo. The agenda setter determines the final legal outcome. Thus, one cannot determine the welfare-maximizing level of entrenchment without making assumptions about the agenda setter.

I will return to agenda setting shortly. For now, focus on a different, loose concept, “rational entrenchment.” A law is rationally entrenched when its win set

¹²⁰ See supra note ___ and accompanying text.

¹²¹ Readers might wonder if rational voters accounting for switching costs would approve a change to law that reduces social welfare. The answer is yes. Part V.A. addresses this issue.

captures its welfare set and as few additional points as possible. In other words, law is rationally entrenched when all welfare-enhancing changes, and the fewest welfare-reducing changes, are possible. Returning to Figure 6, the status quo j , and switching costs of SC1, rational entrenchment requires a 5/7ths rule. That would permit changes from j to any point in the 5/7ths win set. That win set overlaps almost perfectly with the welfare set SC1. The range of possible changes and the range of welfare-enhancing changes more-or-less align.

Now suppose variable switching costs increase. This is tantamount to saying that the value of stability has risen or the costs of instability have grown. Figure 6 captures this with the line SC2, which replaces SC1. For any given change to j —the move to l , for example—switching costs are higher than before.

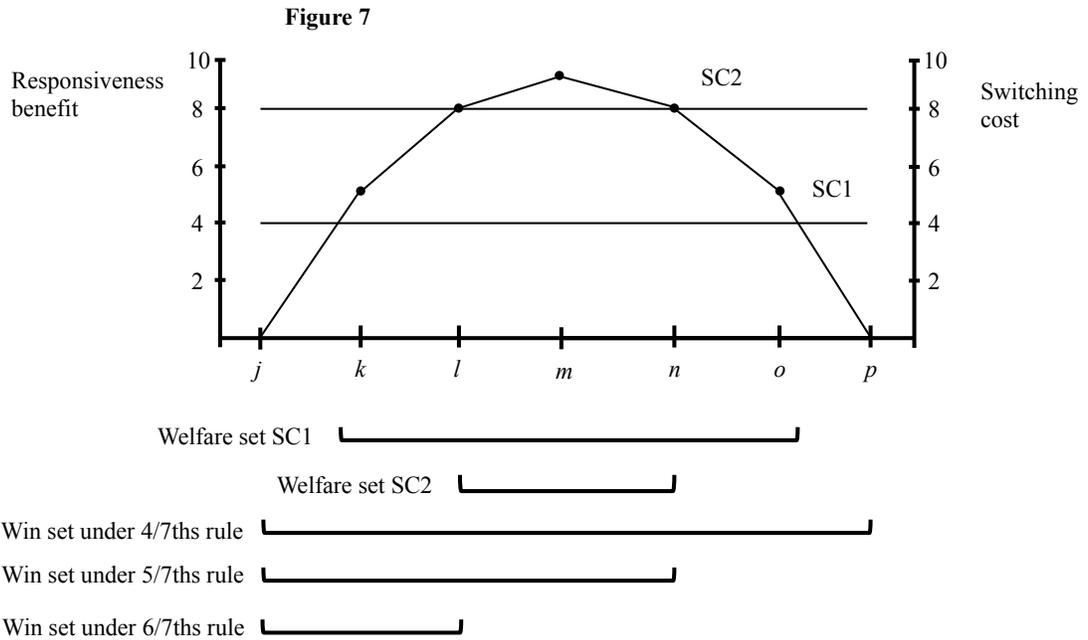
The increase in switching costs affects the welfare set. Moving from j to m given SC1 would increase welfare, but that move given SC2 would decrease it. The welfare set SC2, which is narrower than that for SC1, captures this idea. Now a 5/7ths voting rule is too lenient. It would permit the agenda setter to move law to any point in the 5/7ths win set, and many such moves would reduce welfare. Rational entrenchment requires a 6/7ths voting rule. Under this rule, law can only move from j to points in the 6/7ths win set, which overlaps with the welfare set SC2.

Note that as variable switching costs increase, the welfare set recedes towards the status quo. Likewise, as the voting threshold rises, the win set recedes towards the status quo (this is the incrementalism principle from Part II.C). Thus, the analysis uncovers a deep logic for entrenchment. Not only does entrenchment prevent law from changing when, because of switching costs, change would reduce welfare. It also encourages

welfare-enhancing change. As variable switching costs rise, incremental change becomes preferable, and entrenchment promotes incrementalism. Entrenchment facilitates exactly the kinds of changes to law that create more benefits than costs.

B. Entrenchment and Fixed Switching Costs

The last section considered variable switching costs, and this one focuses on fixed switching costs. Consider Figure 7. The status quo law equals j , and the cost SC1 accrues every time law changes, regardless of the magnitude. SC1 equals four, as the right-hand axis shows. If law creeps from j to a point just to the right, switching costs equal four, and if law jumps from j to o , the costs still equal four.



From j , moving to any point in the welfare set SC1 would increase welfare. To demonstrate, consider the move to k , which lies inside the set. The responsiveness gain

equals five, which exceeds the switching cost of four. In this case, rational entrenchment requires majority rule. The win set under majority rule captures every point in the welfare set SC1. Of course, it captures other points too, like those just left of p . Under majority rule, law could move to those points, but that would reduce welfare.

Now suppose the value of stability rises. The line SC2 reflects this; fixed switching costs have gone up. This affects the welfare calculation, and the new welfare set SC2 is narrower than the old set. The move from j to k , which increased welfare before, decreases welfare now. The utility gain equals five, but the switching cost equals eight.

Recall that increases in variable switching costs cause the welfare set to recede towards the status quo. The analysis of fixed switching costs does not reach the same conclusion. When fixed costs rise, the welfare set converges on the median. The intuition is straightforward: because these switching costs are fixed, and because moving closer to the median always increases the benefits of responsiveness, moving to the median always has the higher net payoff.

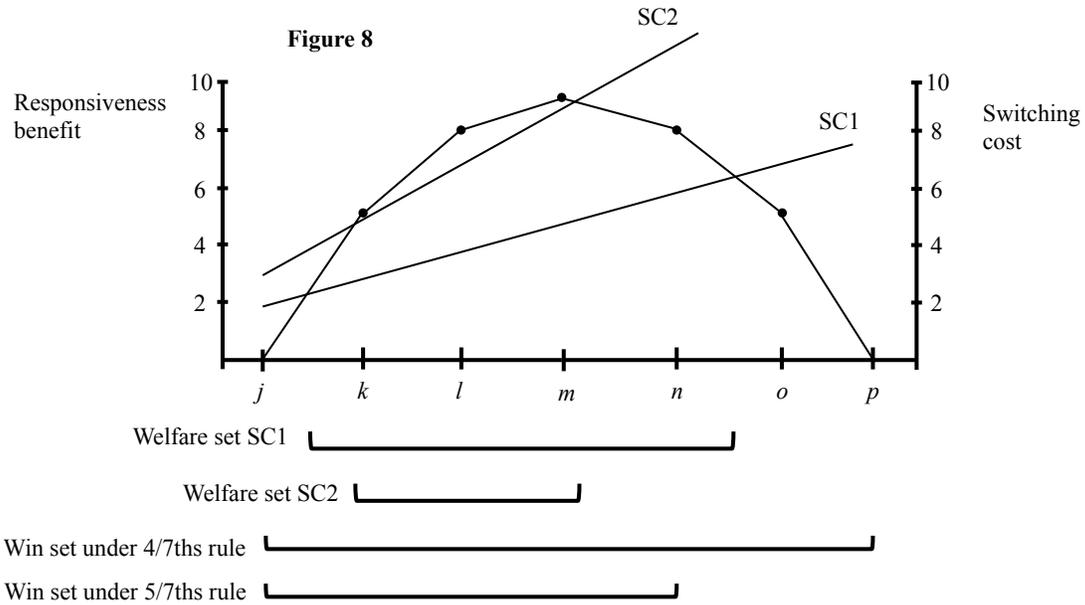
The last section showed that as variable switching costs rise, entrenchment should always deepen. This keeps the possible changes to law and the beneficial changes to law aligned. However, this logic does not hold with fixed switching costs. As fixed costs rise, deepening entrenchment keeps the possible and beneficial changes to law aligned, but only up to a point. If entrenchment becomes too deep, it leads to misalignment. Return to Figure 7, and suppose switching costs increase to SC2. A legal designer who understands that switching costs have just risen might react by deepening entrenchment. She might adopt a $6/7$ ths voting rule, reasoning that switching has become very costly,

therefore it should be discouraged, and a 6/7ths rule will do the trick. That designer is mistaken. The win set under 6/7ths shows the possible changes to j , and the welfare set SC2 shows the beneficial changes to j . They do not overlap. All possible changes to law *reduce* social welfare.

In this scenario, rational entrenchment requires a more lenient voting rule, 5/7ths. Now the win set encompasses the welfare set, and welfare-enhancing change is possible. The win set under a 5/7ths rule also encompasses many potential changes (from j to k , for example) that would reduce welfare. Thus, fixed switching costs present a dilemma. To offset them, law must change relatively drastically, but any voting rule that permits drastic change also permits incremental change.

C. Combined Costs

The prior sections analyzed variable and fixed costs in isolation, but most legal change must come with both. This section combines them in Figure 8. The status quo law equals j , and SC1 captures the costs of moving rightward from that point. SC1 starts above the horizontal axis, meaning legal change comes with fixed costs, and it slopes upward, meaning change also comes with variable costs.



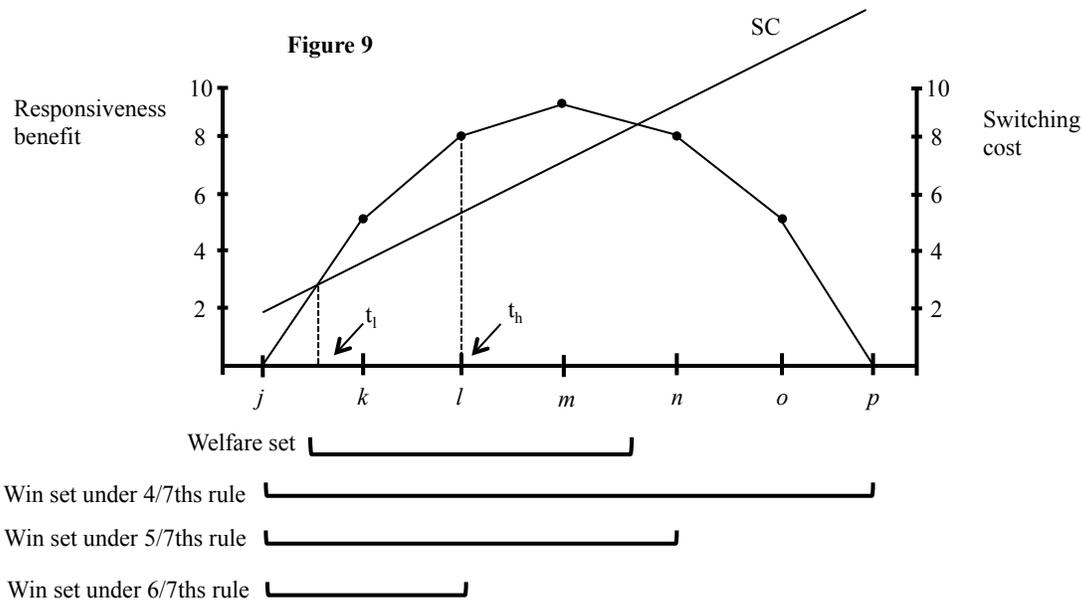
Given SC1, rational entrenchment requires majority rule. The win set under majority rule captures the welfare set SC1. Of course, it captures other points too. Under majority rule, law could move from j to o , but because of variable switching costs that would reduce social welfare. Likewise, law could move from j to a point just to the right, but because of fixed switching costs that would also reduce welfare.

Suppose switching costs change. If variable costs increase, SC1 rotates counterclockwise. If fixed costs increase, SC1 shifts upward. If both costs increase, SC1 gets replaced by a line like SC2. In all three cases, the welfare set, like a candle burning on both ends, collapses on itself. As its right end recedes, entrenchment should deepen, but because the left end recedes it should not deepen too much. If it deepens too much, only minor change becomes possible, and because of fixed costs minor change can reduce welfare. Thus we return to the dilemma. To offset fixed costs, law must change relatively drastically, but any voting rule that permits drastic change also permits minor, welfare-reducing change. This raises afresh the issue of agenda setting.

D. Entrenchment and Agenda Setting

Entrenchment does not dictate particular outcomes. The level of entrenchment does not determine what new law, if any, replaces the status quo. Rather, it determines the range of possible changes to the status quo. Within that range, some changes may benefit society a little, some may benefit society a lot, and some may harm society. The agenda setter decides what change to propose. Thus, scholars and legal designers must attend to agenda setting. Entrenching without regard for the agenda setter is like pitching a baseball without regard for the batter.

The spatial model clarifies the relationship between entrenchment and agenda setting. Consider Figure 9. From a status quo law of j , moving rightward would reduce social welfare until the point t_l , which represents a low tipping point. Thereafter, moving rightward would increase social welfare by greater and greater amounts until the point t_h , which represents a high tipping point. Moving from j to t_h would maximize social welfare. At that point, the gap between responsiveness benefits and switching costs is greatest. Moving rightward of t_h would increase welfare, but by smaller and smaller amounts until we reach the end of the welfare set. Moving from j to points beyond there would reduce welfare.



What change will the agenda setter propose? If the agenda setter is benevolent and has good information about costs and benefits, she will propose moving from j to t_h . The point t_h lies in all three pictured win sets, so this welfare-maximizing move can be achieved whether the voting rule is majority, 5/7ths, or 6/7ths. The only bad voting rule would be a unanimity requirement. That would prevent the move to t_h , as voter j would oppose it.

This example suggests that if the agenda setter is benevolent and informed, the voting rule does not matter much. This is true but uninteresting. Given this angelic agenda setter, the voting rule should always be majority rule, as that gives her the widest win set and the greatest leverage to make welfare-enhancing change. In fact, we should do away with voting entirely and just make the angelic agenda setter a dictator, as she will always do right by society. As Madison said, “If angels were to govern . . . , neither external nor internal controls on government would be necessary.”¹²²

¹²² The Federalist No. 51, at 264 (James Madison) (Ian Shapiro ed., 2009).

Rather than angels, focus on mortals. Agenda setters come in different stripes. Some prefer small change, some prefer big, and others prefer no change at all. Sometimes an agenda setter's preferred law may align with what maximizes social welfare, but that may not systematically be the case.

Return to Figure 9. The model envisions a society with just seven voters, and presumably one of them serves as the agenda setter for the group. Consider the options in turn. If voter j sets the agenda, she will not propose any change to the status quo, so the voting rule does not matter. If voter k sets the agenda, she will propose moving law to k . That change increases welfare, and the voters will approve that change under majority, 5/7ths, or 6/7ths rule. The analysis runs the same if voter l sets the agenda. She proposes a welfare-improving (maximizing, actually) move to l , and voters will approve that under any of the three voting rules. So far we have no guidance on the optimal voting rule other than this: do not adopt a unanimity requirement.

Now consider voter m . She will propose moving law from j to m , and voters would approve that change under majority rule or a 5/7ths rule. Moving to m would increase welfare, but society could do better. Suppose that the voting rule is 6/7ths. The agenda setter could propose moving law to m , but that proposal will fail, as voters j and k oppose it. Given this, the agenda setter will propose a move to l instead. That proposal moves law as close as possible to voter m 's ideal point while still commanding the required six votes. Happily, it also maximizes social welfare.

The analysis runs the same way for voters n , o , and p . Each would like to move law to his or her ideal point, which would be possible under majority rule or, in n 's case, 5/7ths rule. But those changes would harm society. Given a 6/7ths voting rule, all three

of those agenda setters would propose a move to l and six voters would approve, maximizing welfare.

Now we have guidance on the optimal voting rule: it should be 6/7ths. If the agenda setter is l , m , n , o , or p , this will maximize welfare. If the agenda setter is voter j or k , this voting rule will perform as well or better than any other.

This leads to some interesting observations. First, the optimal degree of entrenchment is quite deep—6/7ths in the model. This is true even if the agenda setter is the median voter, the majoritarian choice and therefore, one might argue, the ideal agenda setter in a democracy. This intuition runs as follows. Moving law from the wing to the center imposes a large burden on society because of variable switching costs. A more incremental change would lower variable switching costs without affecting policy gains very much. That is because policy gains increase at a diminishing rate as law approaches the center. That last move, from l to m , generates policy value of just one and switching costs that exceed one. Thus, an incremental change is preferable, and entrenchment promotes incremental change.

Second, the optimal voting rule forecloses some welfare-enhancing changes. In Figure 9, the optimal 6/7ths rule prevents the agenda setter from moving law right of l , though many such moves—to m , for example—would increase (but not maximize) welfare. Critics of entrenchment note that it prevents bad as well as good changes to law. Professor Schwartzberg, for example, argues that supermajority rules “reduce the risk of harmful amendments” but also “the capacity to enact normatively attractive changes.”¹²³ Figure 9 justifies this. Foreclosing some “normatively attractive changes” can force agenda setters to propose, and voters to enact, normatively *optimal* changes.

¹²³ Schwartzberg, *supra* note ____, at 132.

I started this section by stating that ideal entrenchment depends on the agenda setter. The analysis, however, shows that the optimal voting rule equals 6/7ths regardless of the agenda setter. This is correct, but only under the particular assumptions of the model. Consider in Figure 9 the space between j and t_1 . Moving from a status quo of j to any point in that space would decrease welfare. If the agenda setter must be one of the seven voters in the model, no proposal to move from j to that space would arise. But suppose there are not seven voters but dozens, some with ideal points between j and t_1 . Alternatively, suppose a body distinct from the voters sets the agenda, like Congress sending a constitutional amendment to the states.¹²⁴ In both cases, a proposal to move to a point between j and t_1 could arise. Proposals in that set could become law, reducing social welfare.

Entrenchment can solve this problem. If the agenda setter will propose a change from j to t_1 or beyond, the optimal voting rule is 6/7ths as discussed. If, however, the agenda setter will propose a change from j to a point left of t_1 , the optimal rule is unanimity, as that will foreclose any change. So the optimal voting rule is conditional. Depending on the agenda setter's preference, law should be entrenched with a 6/7ths rule or unanimity.

Optimizing the voting rule does not require detailed information on the agenda setter. One need not know exactly where her ideal point lies. One need only determine (or make a good guess about) whether that ideal point lies left or right of t_1 .

This leads to a counterintuitive conclusion. Given an agenda setter who prefers to make minor changes to law, entrenchment should be deep. Given a relatively radical agenda setter who seeks significant legal change, entrenchment should be relatively

¹²⁴ See supra note ___ and accompanying text.

shallow. Radicals should have *greater* latitude than their strongly incrementalist counterparts, though not so much that they can actually make radical change. Perhaps this helps justify why democracies pair constitutional entrenchment with agenda setters who more-or-less align with today's median voter.

V. COMPLICATIONS

This Part confronts two lingering issues. The first pertains to switching costs: who bears them, and how does this affect voters' decision-making? The second pertains to intense minorities. So far the analysis has assumed that voters have equally intense preferences, but what happens when this assumption does not hold? Exploring these issues generates new ideas but does not disturb the basic conclusions above.

A. Allocation of Switching Costs

Who suffers when law destabilizes? Restated in terms of the foregoing analysis, who bears the switching costs associated with legal change? The last Part did not address this question. Instead, it assumed voters *ignore* switching costs. But those costs are real, and they harm society. In the simple model, society consists of only seven voters, j through p , so the switching costs must fall on one or more of them. A rational voter who would benefit from responsive law but pay an even higher switching cost would oppose legal change. Without explicitly stating it, I have assumed the seven voters are irrational. They vote on the basis of responsiveness alone, with no regard for switching costs.¹²⁵

¹²⁵ Alternatively, one could get the results presented so far by assuming that the opponents of a change in law bear all of the switching costs.

Sometimes this assumption is reasonable. To demonstrate, in 2011 voters in Ohio confronted a ballot initiative mandating that “no law or rule shall compel . . . any person . . . to participate in a health care system.”¹²⁶ The initiative was (ineffectively) designed to undercut the individual mandate in the Affordable Care Act.¹²⁷ When they approved the initiative by a large majority, Ohioans did not seem to realize that it could require universities to adjust their student health plans, schools to adjust immunization programs, researchers to track diseases differently, and so forth.¹²⁸ Voters bore switching costs, but there is little evidence they contemplated them when casting ballots.

When voters are myopic or uninformed, they should behave as the last Part predicts. Here I focus on the opposite case. Suppose voters are rational and fully informed. They know about switching costs. How does that affect the analysis?

The answer depends in part on how switching costs get allocated, which depends on context. When the sales tax jumps, consumers, especially poor ones, change their consumption patterns.¹²⁹ When the 18th Amendment passed, whiskey distillers lost their investments, bar owners had to change plans, patrons had to find new recreational activities, and so forth.

If the allocation of switching costs depends on context, then voters’ behavior in the face of such costs must depend on context. The relationship between entrenchment and legal change when switching costs get borne one way may differ from the relationship when they get borne another way. Thinking about the allocation of switching costs raises interesting questions that could motivate future research. Here I

¹²⁶ See Gilbert, *Interpreting*, supra note ____, at 1621.

¹²⁷ See *id.*

¹²⁸ See *id.* at 1622.

¹²⁹ To be clear, I do not mean that sales taxes always harm consumers. The revenues may provide public goods that, on balance, make consumers better off. I mean only that sales taxes change consumption patterns and that changing those patterns comes with costs.

focus on a single, simple case: voters bear switching costs on a pro rata basis, meaning they all pay the same amount. Now the question is sharper: assuming voters account for switching costs pro rata, what is the optimal level of entrenchment?

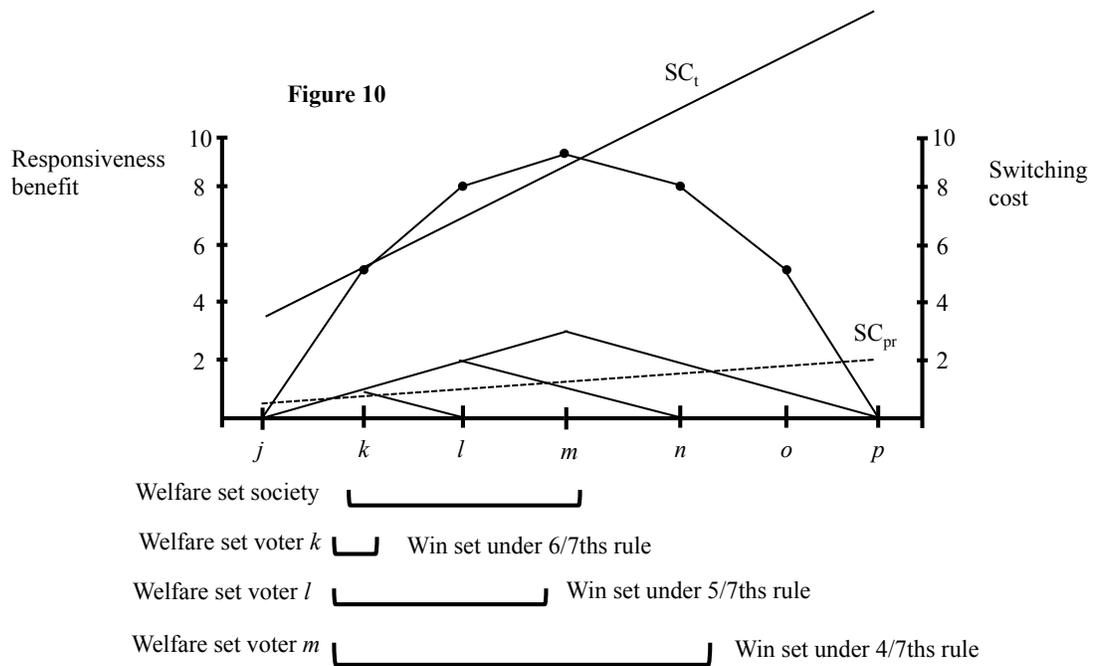
Return to the example of immigration and three legislators. The quota starts at 9,000, and they respectively prefer 10,000, 20,000, and 30,000. If switching were costless, all three legislators would support raising the quota from 9,000 to 9,100. For all three that would deliver a small benefit and, by assumption, no cost. Given that switching is costly, however, and that the legislators account for this, they may not approve such a change. For all three it would deliver a small benefit, and for each the switching cost may outweigh that benefit.

Now consider a different proposal: raising the quota from 9,000 to 24,000. As a policy matter, the second and third legislators would support that change. But the change is relatively large, and so switching costs may be large enough to swamp the benefits. Like the proposal to move to 9,100, this proposal may fail unanimously. For all three legislators the costs may outweigh the benefits.

These examples generate an intuition. When voters account for switching costs, they oppose small and large changes to law. They oppose small changes because the fixed costs they bear outweigh the benefits of small change, and they oppose large changes because the variable costs outweigh the benefits of large change.

Figure 10 captures this. As before, the status quo law equals j , the aggregate utility curve looks like a hump, and the total switching cost appears as a line labeled SC_t . Moving from j to any point in the welfare set would increase social welfare. The figure includes two new features. First, it shows the benefits of responsiveness for three

individual voters, k , l , and m . Voter k 's benefit is captured by the triangle that peaks above k . Moving law from j to k would increase her utility by one, and moving law from k to l would decrease it by one. Voter l 's benefit is captured by the triangle that peaks above l . Moving law from j to k would increase l 's utility by one, moving law from j to l would increase it by two, and so on. Voter m 's utility peaks above m . Similar triangles could be drawn for the other voters. Second, the figure shows pro rata switching costs with the dashed line SC_{pr} .¹³⁰ As law moves rightward from j , every voter pays the corresponding cost.



These features allow for the creation of individual welfare sets. Consider voter k . As a matter of policy preference, she prefers every point between j and l to a status quo law of j . But once she accounts for her own switching costs, this ceases to be true. She only prefers points in her welfare set to j . These points alone generate enough benefit to

¹³⁰ Multiplying SC_{pr} by seven (because there are seven voters) yields SC_t .

offset her switching costs. Figure 10 shows welfare sets for l and m as well, which follow from the same logic.

The figure supports the intuition from the immigration example: when voters account for switching costs, they oppose small changes to law. A proposal to replace j with a law just to its right will get *zero* votes. Likewise, switching costs cause voters to reject large changes. Voter l opposes moving law from j to m . Although that would draw law much closer to her ideal point, the large change would generate switching costs that outweigh benefits.

Note that the individual welfare sets are nested. Each starts at the same place. If one plotted welfare sets for voters n , o , and p , they would start at the same place too. Voter l 's welfare set encompasses voter k 's, meaning l supports everything k supports and then some. Voter m 's welfare set encompasses voter l 's, meaning m supports everything k does and then some, and so on.

Now relate switching costs to win sets. Suppose the voting rule equals $6/7$ ths. Because the status quo matches voter j 's ideal point, she will never support change. Thus, to change law under this rule requires support from k , l , m , n , o , and p . The only alternatives that all six of them prefer to j lie in voter k 's welfare set. Her welfare set equals the win set under $6/7$ ths rule. Voter l 's welfare set equals the win set under $5/7$ ths rule, and so on.

Now I can revisit the claims from above. Earlier I showed that as variable switching costs increase, entrenchment should always deepen, as that will cause the range of possible changes to law to track the range of welfare-enhancing changes. Furthermore, I showed that as fixed costs increase, entrenchment should deepen, but only

up to a point. If entrenchment gets too deep, all possible changes to law reduce welfare. Those ideas hold even when voters account for switching costs, as Figure 10 shows. As the switching cost line gets steeper (variable costs increase) and as it shifts upward (fixed costs increase), society's welfare set burns on both ends. The same holds for individual voters' welfare sets. Deepening entrenchment will keep the win set aligned with society's welfare set, but only for awhile. If entrenchment gets too deep, only minuscule change will become possible, and such change reduces welfare. To visualize this, notice the points left of k that fall in the win sets but out of society's welfare set. If there were many more voters, and therefore many more potential voting rules and win sets, deep entrenchment could limit change to those points only. All possible changes to law would reduce welfare.

Earlier I argued that optimal entrenchment depends on the agenda setter. Again, accounting for switching costs does not change this conclusion. If the agenda setter prefers points between j and the left end of the welfare set, then entrenchment should be complete. All changes the agenda setter favors would reduce welfare, and a unanimity requirement would prevent her from making any changes. If the agenda setter prefers points inside the win set or to its right, then entrenchment should be shallower. Earlier a 6/7ths rule was optimal, but that is no longer true. In Figure 10, such deep entrenchment would preclude the welfare-maximizing change to l . Now the optimal voting rule is 5/7ths. Under that rule, every possible change the agenda setter can propose and that five voters support increases (and possibly maximizes) welfare.

Two conclusions follow from this. First, when voters account for switching costs pro rata, the analysis becomes richer. It shows that voters will not approve small or large

changes to law that would reduce welfare. However, the basic findings—about switching costs, optimal entrenchment, and agenda setting—stay the same. This includes the finding that voters might approve changes to law that, because of switching costs, reduce social welfare. That is surprising, and it leads to the second conclusion: even when voters are fully informed, entrenchment has a place.

This runs contrary to others' conclusions. For example, Professor Przeworski has argued that "If people value legal stability, then simple majorities should be hesitant to change laws [S]imple majority rule is sufficient to prevent capricious legal changes."¹³¹ This is wrong. Even if everyone accounts for the value of stability, a majority may support welfare-reducing changes. To demonstrate, consider a numerical example. Imagine voters j through p voting on a proposal to change the immigration quota. As a matter of policy, j , k , l , and m prefer the change, and making it would create a responsiveness benefit of one apiece, for a total gain of four. The other voters, n , o , and p , oppose the change, as it would create a responsiveness loss of one apiece, for a total loss of three. Adopting the proposal would impose a switching cost of 0.25 on each voter. A majority, m , n , o , and p , will support the change, as it delivers a net benefit of .75 to each, so the proposal becomes law. But this change harms society. Factoring in utility and switching costs, the gains to m , n , o , and p total three, while the losses to j , k , and l total 3.75.

The root problem is that switching costs create an asymmetry between the winners and losers from a change in law. The voters who support a change, a majority, gain the *difference* between their responsiveness benefit and the switching cost they pay.

¹³¹ Adam Przeworski, *Democracy and the Limits of Self-Government* 139 (2010).

Voters who oppose the change, a minority, suffer the *sum* of their responsiveness loss and the switching cost. Thus, each loser loses more than each winner wins. When there are many winners and few losers, legal change increases welfare, but when winners barely outnumber losers, change reduces welfare. Majority rule facilitates those welfare-reducing changes, and entrenchment prevents them.

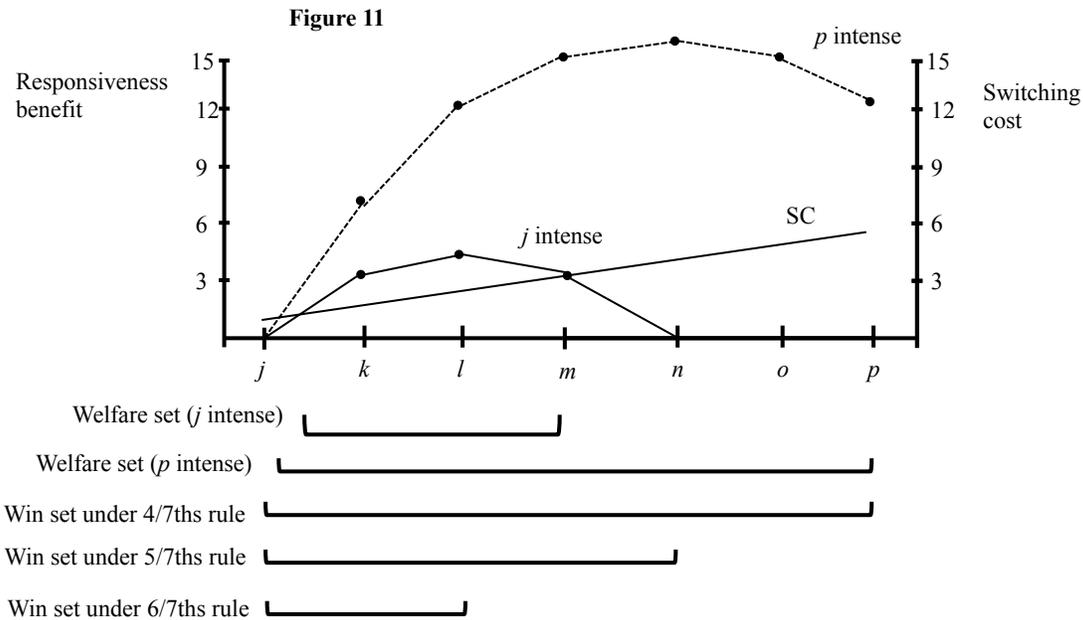
B. Intense Minorities

So far the analysis has assumed that voters have equally intense preferences. What happens when they do not? Because preference intensity can vary in different ways, and because I do not consider all possible configurations, the answer this section provides is partial. But it casts light on a situation of great interest to legal scholars: a small minority feels more intensely than the majority.¹³²

Figure 11 resembles the prior ones with some important exceptions. First, it assumes that voters do *not* account for switching costs. This simplifies matters and, as the last section showed, does not affect the basic analysis. Second, Figure 11 has two responsiveness curves. Focus first on the solid one, labeled “*j* intense.” It assumes voter *j* has more intense preferences than the other voters. When law moves one ideal point closer to hers, she gains three from responsiveness while the other voters gain only one. When law moves one ideal point further from her, she loses three while the others lose only one. The status quo law aligns with voter *j*’s ideal point. Thus, “*j* intense” shows society’s responsiveness benefit when law moves away from a status quo that protects an

¹³² Scholars have long been interested in the connection between democracy and minorities. See, e.g., The Federalist No. 51, at 265 (James Madison) (Ian Shapiro ed., 2009) (“If a majority be united by a common interest, the rights of the minority will be insecure.”). In *United States v. Carolene Products Company*, 304 U.S. 144, 152 n.4 (1938), the Supreme Court indicated that courts might give heightened review to laws aimed at “discrete and insular minorities,” sparking special interest in this topic among jurists.

intense minority. As an example of this scenario, consider *Shelby County v. Holder*, which invalidated part of the Voting Rights Act,¹³³ and the subsequent adoption of voting procedures that plausibly burdened African Americans.¹³⁴ The law on voting became less protective of minorities.



Note a few things about the “j intense” curve. It retains the same shape, but the peak is lower and left of center. Moving law away from *j*—making the intense minority worse off—and towards the median voter creates an overall responsiveness benefit.

When added up, the small benefit that each member of the majority gains exceeds the large cost that the minority bears. However, the benefit is modest, and it is maximized at

¹³³ *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013) (holding Section 4(b) of the Voting Rights Act unconstitutional).

¹³⁴ See Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 *Colum. L. Rev.* 2143, 2145-46 (2015) (“[T]he day *Shelby County* was decided, Texas announced that it was implementing its strict voter-ID (identification) requirement, which section 5 had previously blocked. Voter-ID laws recently adopted in Alabama and Virginia were also freed to take effect. Two months later, North Carolina enacted a sweeping election reform bill that the president of the state’s National Association for the Advancement of Colored People (NAACP) chapter called, ‘the worst voter suppression law since the days of Jim Crow.’”) (internal citations omitted).

l , not m . With an intense minority in the picture, law should not be *too* responsive to the median, but it should be somewhat responsive. That second point is deeper than it seems. Optimal responsiveness requires accounting for intense minorities, but to what degree depends on just how intense the minorities are. As their intensiveness grows, law should move closer to their preferred position, and as it declines law should slide toward the center.

Now add switching costs to the analysis. This generates a narrow welfare set, and all of the foregoing analysis applies. As switching costs increase, the welfare set burns on both ends. Entrenchment should deepen, but not too much. Optimal entrenchment requires a 6/7ths voting rule. If the agenda setter is voter j , the rule does not matter because she will not propose any change. If the agenda setter is any of the other voters, a 6/7ths rule will cause law to move from j to k or l , increasing (or, if moving to l , maximizing) welfare in both cases. Note that the 6/7ths rule forecloses many welfare-reducing changes.

Turning to a different scenario, focus on the dotted responsiveness curve labeled “ p intense.” It assumes voter p has more intense preferences than the other voters. When law moves one ideal point closer to hers, she gains three from responsiveness while the others gain one, and when law moves one ideal point away she loses three while the others lose one. The status quo law aligns with voter j ’s ideal point. Thus, “ p intense” shows society’s responsiveness benefit when law moves away from a status quo that harms an intense minority and toward a new law benefitting that minority. As an

example of this scenario, consider passage of the Voting Rights Act of 1965, which changed a repressive status quo and empowered minority voters.¹³⁵

The curve has the usual shape, but the peak is higher and right of center. Moving law towards the center benefits most voters a little and the intense minority, voter p , a lot. The total responsiveness benefit only begins to decline when law moves past n . At that point the gains to the minority do not exceed the losses incurred by the increasingly large majority. Again, law should respond to minorities according to their degree of intensity. If voter p were more intense, the curve would peak above o or even p .

Accounting for switching costs generates a very wide welfare set. As switching costs grow, the welfare set burns on both ends, and entrenchment should deepen. Optimal entrenchment requires a 5/7ths voting rule. If the agenda setter is voter j , the rule does not matter because she will not propose any change. If the agenda setter is any of the other voters, a 5/7ths rule will cause law to move from j to k , l , m , or n , increasing welfare in every case. Note that the 5/7ths rule forecloses some changes (from j to o , for example) that would increase welfare, but doing so promotes others changes (from j to n) that would increase welfare by even more.

Intense minorities change the picture in a couple of ways. When voter j is intense—that is, when law protects an intense minority—the welfare set is narrow, and entrenchment should be relatively deep. Deep entrenchment protects the status quo from change and, when change becomes possible, promotes incrementalism. In the figure, law

¹³⁵ See, e.g., Guy-Uriel E. Charles & Luis Fuentes-Rohwer, The Voting Rights Act in Winter: The Death of a Superstatute, 100 Iowa L. Rev. 1389, 1390 (2015) (The Voting Rights Act is “widely regarded as the most successful civil rights statute ever enacted by Congress”).

should move a little, but only a little, further from j and closer to m . In other words, incremental change is optimal, and entrenchment promotes incrementalism.

When voter p is intense—when law does not protect an intense minority—the welfare set is wide, and entrenchment should be relatively shallow. Shallow entrenchment permits relatively drastic change, and drastic (though not complete) change towards the preferred position of the intense minority maximizes welfare. This case has a couple of interesting extensions. First, it demonstrates the only circumstance in which, despite switching costs, law should move ahead of society, meaning switch sides of the median: when a minority on the far side is intense and switching costs are low. Second, it illustrates plainly the power of the agenda setter. Suppose voter p is intense and the voting rule is 5/7ths. Law could leap from j to n , better protecting that minority and maximizing welfare. Or the agenda setter could propose a change to k or no change at all.

Aside from these points, intense minorities do not change the basic analysis of entrenchment. The spatial model provides a general approach to the problem.

VI. IMPLICATIONS

The paper began with an age old question: how changeable should a constitution be? The answer depends largely on the tradeoff between stability and responsiveness. The prior parts examined that tradeoff carefully, developing relationships between entrenchment, legal change, and social welfare. Those relationships uncover important points—about the nature of switching costs, the importance of agenda setting, the inability of even informed, rational voters using majority rule to make optimal changes to

law, and so on. That constitutes the heart of the project. This part extends the analysis by commenting on some additional issues. The first one has attracted attention from many legal scholars: how does judicial updating compare? Should constitutional law change only through formal amendment processes, or should judges reinterpret the text over time to keep it current? The answer is the latter, at least in some circumstances. The second issue is democracy, which has a more fundamental problem than scholars realize. The third, smaller issue is consensus, which many value in group decision-making but which can create an unrecognized problem.

A. Judicial Updating

Entrenched law can evolve through formal amendment, which has been the focus so far, or it can evolve through judicial interpretation. To illustrate, the text of a constitution can change to grant same-sex couples a right to marry, or judges can interpret existing text to grant that right, as the Supreme Court did in *Obergefell v. Hodges*.¹³⁶ These methods of change are linked. When a constitution is entrenched and difficult to amend, judicial discretion grows.¹³⁷ Judges can take a variety of positions on the meaning of law without facing override.

Scholars have long debated the merits of judicial updating as an alternative to amendment.¹³⁸ In the U.S., one group claims that Article V provides the exclusive mechanism for changing the Constitution and that judicial updating violates this principle

¹³⁶ 135 S. Ct. 2584 (2015).

¹³⁷ See supra note ___; Cooter, supra note ___, at 232 (“In general, lowering the obstacles to changing the constitution, such as requiring a simple majority instead of a super-majority, decreases the discretionary power of the courts to interpret the constitution.”).

¹³⁸ See, e.g., Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever*, 17 *Cardozo L. Rev.* 691 (1996); Vermeule, *Amendments*, supra note ___; McGinnis & Rappaport, *Good*, supra note ___; Strauss, supra note ___.

and produces bad results.¹³⁹ This view is closely associated with originalism.¹⁴⁰ The other side rejects originalism¹⁴¹ and embraces a more active role for courts. Professor Strauss, for example, argues that Article V presents “just too difficult a process” and “living constitutionalism”—meaning judicial updating—“is inevitable, and necessary.”¹⁴² This section examines the debate using the model above. The model cannot capture all relevant considerations, but it captures a central one: keeping law current while maintaining stability. The main conclusion is straightforward. Even when law is optimally entrenched, judicial updating can improve social welfare. Updating has a place.

Consider Figure 12, and suppose the status quo equals j and switching costs equal $SC1$.¹⁴³ Further, suppose the agenda setter is voter k . She would like to move law from j to k , but that would reduce welfare—the switching costs of that change outweigh the responsiveness gains. If law is optimally entrenched, then that net-negative change will not happen. Unanimity rule alone can prevent that change, so optimal entrenchment requires unanimity rule.

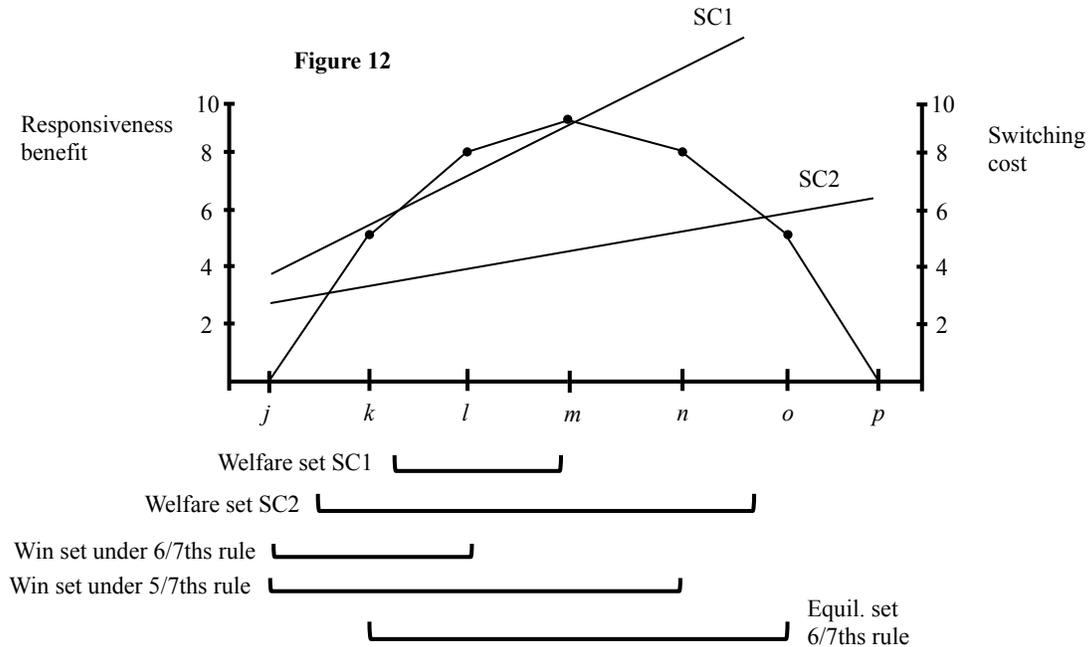
¹³⁹ See, e.g., Scalia, *supra* note ___, at 854; McGinnis & Rappaport, Good, *supra* note ___, at 85–99.

¹⁴⁰ See, e.g., *id.*

¹⁴¹ But see Balkin, *supra* note ___ (developing a theory of originalism that reserves a place for judges in constitutional construction).

¹⁴² Strauss, *supra* note ___, at 115.

¹⁴³ I assume that voters ignore switching costs, which, as Part V.A showed, does not change the basic analysis.



Unanimity rule prevents all formal amendments—law stays at *j*. Adopting a unanimity rule, however, does not mean law *should* stay at *j*, only that *j* is preferable to any change the agenda setter would initiate. If a court interpreted law to mean anything in the welfare set SC1, that would increase welfare. If a court interpreted law to mean *l*, that would maximize welfare. A range of interpretations, all properly foreclosed from adoption through formal amendment, would make society better off.

Judicial updating does not guarantee a welfare improvement. A court could interpret law to mean anything in the equilibrium set, which under unanimity rule stretches from *j* to *p*,¹⁴⁴ without being overridden. That includes many welfare-reducing points like *k* and (worse yet) *o*. The objective is not to show that updating necessarily outperforms amendment, just to show when and why it can.

This illuminates the debate over the U.S. Constitution. Many scholars lament the difficulty of amendment and promote judicial updating to adapt the Constitution to

¹⁴⁴ See *supra* Part II.B.

modern times.¹⁴⁵ It turns out these arguments are separable. Even if the degree of entrenchment is optimal—even if amendment is not too difficult—updating can offer a valuable supplement. As switching costs decline, the welfare set widens, and updating becomes increasingly likely to enhance welfare rather than reduce it.

So far the discussion assumes optimal entrenchment, but this is often infeasible. Constitutional designers cannot know the preferences of all future agenda setters. Likewise, they cannot know the fixed and variable switching costs associated with each potential change to law, in part because those costs fluctuate over time. Even if they had that information, they probably would not assign different, optimal levels of entrenchment to each law. Instead, they would employ a uniform amendment rule, as characterizes many actual constitutions.¹⁴⁶ Thus, a constitution may exhibit optimal entrenchment “on average,” but the amendment rule for any particular provision may be imperfect.

When the depth of entrenchment deviates from the optimum, judicial updating again can outperform amendment. Return to Figure 12, and suppose the status quo equals j . When the law was initially entrenched, switching costs equaled $SC1$, and the agenda setter was correctly understood to prefer k . Unanimity rule was adopted. But something unexpected happened: switching costs dropped to $SC2$. The move from j to k that was properly foreclosed when switching costs equaled $SC1$ is improperly foreclosed now. Thus, entrenchment is suboptimal; law cannot change at all, even though many changes, including ones the agenda setter favors, would increase welfare. Judicial

¹⁴⁵ See, e.g., Strauss, *supra* note ____.

¹⁴⁶ For example, the U.S. Constitution has a single rule for amending its provisions, and there are few exceptions. See U.S. Const. art. V (the Constitution can be amended with two-thirds support in both houses of Congress and ratification in three-quarters of the states, however “no state, without its consent, shall be deprived of its equal suffrage in the Senate”).

updating can help. If a court moves law from j to any point in the welfare set SC2, society benefits.

Consider the reverse scenario. Suppose switching costs equal SC2 to start. The agenda setter is voter k , and law is entrenched using a 6/7ths rule. That degree of entrenchment is optimal: it permits the agenda setter to make her preferred change to k , which creates more welfare than the status quo and any other change the agenda setter would support.¹⁴⁷ But switching costs increase to SC1, and law is no longer optimally entrenched. A 6/7ths rule permits a change to k , reducing welfare. Again, updating can help. Before the agenda setter proposes amending the law to k , a court could interpret existing law to mean l . That interpretation, or any other one that moves law into the welfare set SC1, would increase welfare. Once there, law will not change further, as it lies in the equilibrium set

These ideas reduce to two points. As fixed switching costs increase, a small change to law is more likely to be welfare-reducing. If the agenda setter prefers such a change, courts can update and make a relatively large change to law. Society benefits when courts get ahead of the agenda setter. As variable switching costs increase, a large change to law is more likely to be welfare-reducing. If the agenda prefers such a change, court can update and make a relatively small change to law. Society benefits when courts temper the agenda setter. Note the difference between these ideas and the usual debate about judicial updating. The claim here is not that courts can or should update when entrenchment prevents formal amendments. The claim is that even when formal amendments are possible updating may be optimal.

¹⁴⁷ Note that in this scenario a 6/7ths rule is not the only optimal voting rule. Majority rule and a 5/7ths rule, for example, would also permit law to move to k , increasing welfare by more than any other alternative the agenda setter, voter k , would propose.

Claiming that judicial updating can improve social welfare is one thing; claiming that it *does* is another. To make that claim requires strong assumptions about what information courts possess and what actions they tend to take.¹⁴⁸ I do not make that claim, but I maintain that the analysis has value, both in showing how updating and amendment can interact and, possibly, in evaluating past incidents of judicial updating. Consider *Obergefell*, in which the Supreme Court interpreted the Constitution to grant same-sex couples a right to marry.¹⁴⁹ Rather than updating, the Court could have retained the status quo. Stymied by the judicial branch, advocates could have pushed for a formal constitutional amendment instead. But perhaps that approach would have been inferior. In recent years, public opinion on same-sex marriage shifted,¹⁵⁰ many states accommodated civil unions,¹⁵¹ many employers provided benefits to same-sex couples,¹⁵² and so on. Those facts imply that switching costs decreased. When switching costs decrease, moving law towards the political center is more likely to increase welfare. The Constitution's deep entrenchment would have prevented that move; without judicial updating same-sex marriage would remain illegal in many states. This analysis supports *Obergefell*.

¹⁴⁸ Of course, making the opposite claim—that judicial updating decreases social welfare—also requires strong assumptions.

¹⁴⁹ 135 S. Ct. 2584.

¹⁵⁰ See, e.g., Scott Clement & Robert Barnes, Poll: Gay-Marriage Support at Record High, Wash. Post, Apr. 23, 2015 (reporting about a 20 percentage point increase in popular support for same-sex marriage in the last decade).

¹⁵¹ See Civil Unions and Domestic Partnership Statutes, National Conference of State Legislatures, Nov. 18, 2014, available at <http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> (reporting that about a dozen states enacted legislation on same-sex civil unions and comparable relationships in recent years).

¹⁵² Lisa Schencker & Bob Herman, Same-sex marriage ruling puts health benefits in spotlight, Modern Healthcare, June 26, 2015, available at <http://www.modernhealthcare.com/article/20150626/NEWS/150629906> (“About 77% of large employers offer same-sex domestic partner healthcare coverage”).

B. Democracy and Efficiency

The problem with democracy, many argue, is that it harms minorities. The phrase “tyranny of the majority,” popularized by de Tocqueville, captures the idea.¹⁵³

Democracy often proceeds through majority rule, and the majority can tyrannize minority populations—racial, religious, political, or whatever else—by enacting laws that disfavor them. If members of the minority have more intense preferences than other voters, this “tyranny” can reduce social welfare. Intense minorities, though few in number, suffer large losses while the majority makes only modest gains.

Because of this problem, scholars sometimes say democracy is “inefficient.”¹⁵⁴ This means that when intense minorities are present, majority rule does not maximize social welfare.

This story about democracy and its shortcomings ignores switching costs, and accounting for them deepens the problem. Recall that supporters of a change to law gain the difference between their responsiveness benefit and switching cost, while opponents suffer the sum of their responsiveness loss and switching cost. Thus, switching costs create an asymmetry, even when voters have symmetrically intense preferences: the average member of the minority loses more than the average member of the majority gains. This is exactly analogous to the usual scenario, which ignores switching costs but assumes the presence of an intensely interested minority.

Sometimes an intensely interested minority is present, but not always. Other times an intensely interested minority on one side of an issue counteracts an intensely

¹⁵³ Alexis de Tocqueville, *Tyranny of the Majority*, in 1 *Democracy in America* 263 (Henry Reeve Trans., Rev. ed. 1900).

¹⁵⁴ See, e.g., Cooter, *supra* note ____, at 33 (“The unresponsiveness of majority rule to the intensity of feeling about issues causes its inefficiency.”).

interested minority on the other—advocates and opponents of abortion rights might fit this scenario. For these reasons, the asymmetry that constitutional scholars worry about, though important, may arise intermittently. In contrast, the asymmetry identified here must arise constantly: there are always switching costs. This makes democracy inefficient in a much larger set of circumstances than ordinarily supposed. Pure democracy systematically fails to maximize welfare.

This insight has implications for constitutional and legal design as well as an institution deeply embedded in the United States: direct democracy. Twenty-four states and more than half of American cities permit citizens to sidestep legislatures and make law directly using ballot initiatives.¹⁵⁵ For a century, Americans have used initiatives to address controversial topics, including abortion, guns, affirmative action, taxes, and eminent domain.¹⁵⁶ The requirements for placing an initiative on the ballot vary widely,¹⁵⁷ but once placed the usual requirement for passage of a statutory initiative is simple majority support.¹⁵⁸ In California, a bare majority of voters can use initiatives to amend the state constitution.¹⁵⁹ Initiatives can empower citizens and weaken special interests, but they can also harm minorities, as scholars have long argued. But the problem with direct democracy runs deeper. Because of switching costs, initiatives can reduce social welfare even when intense minorities are not present. This does not mean

¹⁵⁵ See Robert D. Cooter & Michael D. Gilbert, A Theory of Direct Democracy and the Single Subject Rule, 110 Colum. L. Rev. 687, 695 (2010).

¹⁵⁶ See *id.* at 696.

¹⁵⁷ See Comparison of Statewide Initiative Processes, Initiative & Referendum Institute, available at http://www.iandrinstitute.org/docs/A_Comparison_of_Statewide_IandR_Processes.pdf.

¹⁵⁸ See *id.*

¹⁵⁹ Cal. Const. art 2, §§ 8, 10.

direct democracy should be scrapped, but it implies that the threshold for enacting initiatives should rise.¹⁶⁰

C. The Problem With Consensus

Recall that switching costs squeeze welfare-enhancing legal change. Because of fixed switching costs, small changes to law reduce welfare, and because of variable costs large changes reduce welfare. Legal change must not be too grand or too small but, like the famous porridge, just right.

This undercuts some conventional wisdom. “[A] standard public-policy response to uncertainty . . . is to counsel decision makers to proceed through small steps or piecemeal reform[.]”¹⁶¹ In short, incrementalism is good. But those small steps can decrease welfare, even as they draw law closer to the political center. More importantly for entrenchment, this teaches something about consensus.

Scholars often celebrate consensus. In general, one might suppose that laws adopted by consensus will tend to produce more good for society. This is the view of Professors McGinnis and Rappaport, who argue that “most good legislation . . . will enjoy widespread support”¹⁶² and “legislation that can secure a supermajority is preferable to legislation that can secure only a majority.”¹⁶³ But this is not quite right. The smallest changes to law generate the greatest consensus. To illustrate, recall the immigration

¹⁶⁰ In November 2016, Colorado voters approved increasing the threshold necessary to enact a constitutional initiative from majority rule to a 55 percent supermajority rule. See Kevin Simpson, Amendment 71: Coloradans approve making constitution harder to amend, *Denver Post*, Nov. 8, 2016.

¹⁶¹ Vermeule, *Amendments*, supra note ___, at 251. See also Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 3–6 (1999) (developing the same point).

¹⁶² John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 *Tex. L. Rev.* 1115, 1132 (2007).

¹⁶³ John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 *Tex. L. Rev.* 703, 733 (2002).

quota of 9,000 and the legislators who prefer 10,000, 20,000, and 30,000. All three may support changing the quota to 10,000, but no more than two will ever support the larger move to 20,000.

Sometimes smaller changes are better. Depending on switching costs, moving from 9,000 to 10,000 may produce more welfare than moving from 9,000 to 20,000. But the calculus may run the other way. If fixed costs are high enough, moving from 9,000 to 10,000 may reduce welfare. Depending on who bears the switching costs and voters' awareness of those costs, voters may approve the welfare-reducing change to 10,000. To generalize, incremental change generates consensus, and, given fixed switching costs, consensus can harm society. Legislation that can secure a supermajority is not necessarily preferable. The best changes to law may come with significant dissension.

CONCLUSION

In the United States and around the world, democracy rests on constitutionalism, and constitutionalism rests on entrenchment. Scholars have devoted thousands of pages to entrenchment and uncovered great insights, and legal designers rely on those ideas when drafting constitutions today. Yet the literature on the key point—how entrenched should constitutions be?—remains surprisingly thin. Scholars have developed the sides of the argument in detail, extolling the many advantages of stability and responsiveness, respectively. But they have not compared the sides in a complete way or combined them with sharp analysis. Much of the work, while providing value throughout, ultimately assumes its own conclusion. This Article tries to chart a new course, to advance our understanding of entrenchment and its relationship to stability and responsiveness in a

precise way. It does not resolve the debate, of course, or even provide exact prescriptions. But it makes progress.